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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 295

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

FILED AUGUST 19, 1936.

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[fol. 5]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

In Equity. No. 325

LEGH R. POWELL, JR., and HENRY W. ANDERSON, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant

BILL OF COMPLAINT—Filed March 21, 1935

To the Honorable, the Judge of the District Court of the United States for the Southern District of Georgia:

Legh R. Powell, Jr. and Henry W. Anderson, as Receivers of the Properties of Seaboard Air Line Railway Company and of a common carrier subject to the Interstate Commerce Act, bring this their Bill of Complaint in Equity against the United States of America, and as a basis for the relief hereinafter prayed respectfully show:

[fol. 6] I

Both plaintiffs are citizens and residents of the State of Virginia, and are the duly qualified Receivers of the properties of Seaboard Air Line Railway Company, a corporation of Virginia and other States, appointed by orders of the District Court of the United States for the Eastern District of Virginia and by orders of the District Court of the United States for the Southern District of Florida, in the Ancillary Receivership Proceedings instituted and still pending in said Court.

II

Jurisdiction of this Court is invoked under the Act of Congress approved October 22, 1913, 28 U. S. C. A., Sections 41(28), and 43 to 48, inclusive. This suit is brought

for the purpose of having enjoined, set aside, annulled and suspended an order of the Interstate Commerce Commission (hereinafter called "the Commission"), dated February 5, 1935, and served upon the plaintiffs on February 14, 1935, in Interstate Commerce Commission Docket No. 26483, entitled "H. D. Pollard, as Receiver of Central of Georgia Railway Company, v. H. A. Page, Jr., C. F. Harris, Fort Benning Railroad Company, et al.," a copy of which order together with the report of the Commission accompanying the same is attached to this bill of complaint, made a part hereof, and marked "Exhibit 1."

The said order of February 5, 1935, herein complained of requires that a tariff of the plaintiffs known as I. C. C. [fol. 7] No. A-6826, Sixth Revised Page 139 (hereinafter called "the tariff"), effective December 4, 1933, be stricken from the files of the Commission. A copy of said tariff is attached to this bill of complaint, made a part hereof, and marked "Exhibit 2".

III

The facts upon which the plaintiffs seek relief are as follows:

(1) Fort Benning Junction, Georgia, is a station near Columbus, Georgia, served by the plaintiffs and by the Receiver of Central of Georgia Railway Company. Adjacent to this station, and approximately six miles therefrom, is Fort Benning, Georgia, an infantry and tank training camp of the United States Government located within a large military reservation. A railroad track owned by the United States and connecting the trunk lines at Fort Benning Junction with the military reservation was for a number of years operated by the Central of Georgia Railway Company. In the early part of 1932 the military authorities having charge of transportation at Fort Benning entered into an arrangement with Page and Harris, a partnership engaged in conducting short line railroad operations at this and other points, whereby the Fort Benning track was to be operated under license and lease by Page and Harris as a private carrier until Page and Harris could obtain the necessary authority from the Commission to operate as a common carrier. Page and Harris having applied to the Commission for a certificate of public convenience and necessity under the provisions of paragraph [fol. 8] (18) of Section 1 of the Interstate Commerce Act,

the Central of Georgia Railway Company appeared in opposition, notwithstanding which the requested certificate was issued. Fort Benning Railroad Company Acquisition, 193 I. C. C. 223. Shortly thereafter, however, the Commission re-opened the proceeding for reconsideration and, reversing its previous finding, denied the certificate. (193 I. C. C. 517.)

(2) Following the failure of the plan of the military authorities to secure common carrier railroad service for Fort Benning in this manner, the plaintiffs themselves undertook to meet the need for such service by filing with the Commission, in the manner provided by law, and effective December 4, 1933, the tariff herein involved extending the switching limits of Fort Benning Junction to include certain designated receipt and delivery tracks within the military reservation. Under this tariff the plaintiffs deliver to and receive at the receipt and delivery tracks within the military reservation shipments billed to and from Fort Benning Junction without additional charge for the movement between Fort Benning Junction and the military reservation. For purposes of convenience and economy in carrying out the obligations thus undertaken by the tariff the plaintiffs entered into a contract with said Page and Harris, a copy of which is annexed hereto, made a part hereof, and marked "Exhibit 3," whereby the latter agreed to act as agents of the plaintiffs in performing the movement over the track between Fort Benning Junction and the military reservation, and the services thereby offered to the public have been rendered by the plaintiffs in this manner continuously since the effective date of the tariff.

[fol. 9] IV

(1) On May 1, 1934, H. D. Pollard, as Receiver of Central of Georgia Railway Company, filed a complaint with the Commission against H. A. Page, Jr., C. F. Harris, Fort Benning Railroad Company and the plaintiffs. A copy of said complaint is attached to this bill, made a part hereof, and marked "Exhibit 4." In said complaint the said H. D. Pollard, alleging that the tariff here involved and the services rendered and the operations conducted pursuant thereto were unlawful, prayed that the tariff be declared null and void, and the plaintiffs be required to

cancel the same; that the Commission order the plaintiffs to cease and desist from performing the services covered by the tariff; and that the Commission investigate fully, among other things, the arrangements between the plaintiffs and Page and Harris with reference to such operations. Following a hearing, to which numerous shippers of traffic moving under the tariff became parties by intervention, and after full argument, the Commission issued the report and entered the order ("Exhibit 1") herein complained of.

(2) On or about February 21, 1935, the plaintiffs filed with the Commission a petition for reargument and reconsideration and for suspension or vacation of the order of February 5, 1935, which petition, by order dated March 4, 1935, and served upon the plaintiffs on or about March 12, 1935, was denied. Copies of said petition and order of denial are attached to this bill, made a part hereof, and marked "Exhibit 5" and "Exhibit 6," respectively.

(3) In the report accompanying the order herein complained of the Commission finds that the operation by the [fol. 10] plaintiffs over the track between Fort Benning Junction and the military reservation constituted an extension of operation within the purview of paragraph (18) of Section 1 of the Interstate Commerce Act and holds:

"that before the Seaboard (plaintiffs) could lawfully operate the line in question a certificate of convenience and necessity would first have to be obtained."

The report, however, further states:

"Our finding of unlawfulness of the tariff here under consideration, * * *, is not predicated on the fact that the Seaboard (plaintiffs) violated Section 1(18)."

The theory upon which the order is based is set forth in the report as follows:

"By the tariff under consideration the Seaboard undertook to extend the switching district of Fort Benning Junction to include the receiving and delivery tracks at Fort Benning. A carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which can not be served

by other common carriers through switching arrangements or otherwise."

V

(1) Plaintiffs aver that the finding by the Commission that the operation of the track between Fort Benning Junction and Fort Benning, in the manner aforesaid, without a [fol. 11] certificate of public convenience and necessity is a violation of paragraph (18) of Section 1, is an erroneous interpretation and application of the provisions of the Interstate Commerce Act in that operation over said track by the plaintiffs, through their agents, Page and Harris, is not an extension of a line of railroad or of the operation thereof within the intent of paragraph (18) of Section 1 of the Interstate Commerce Act; and in that said track is in fact and in law a spur, industrial or switching track located wholly within one State, within the meaning of paragraph (22) of Section 1 of said Interstate Commerce Act; and that accordingly the plaintiffs may lawfully operate thereover without a certificate of convenience and necessity.

(2) Plaintiffs further aver that although the order herein complained of purports to be entered pursuant to the asserted power of the commission to strike from its files a tariff alleged and found by the Commission to be unlawful, it is in substance, and in actual purpose and effect, an order directing or requiring the plaintiffs to cease and desist from an alleged violation of paragraph (18) of Section 1 of the Interstate Commerce Act, and is therefore null and void, for the reason that under the provisions of paragraph (20) of Section 1 of said Act an operation by the plaintiffs in violation of said paragraph (18) may be enjoined by a court of competent jurisdiction, the procedure thus provided is plenary and exclusive of all other remedies, and refuses to the Commission the power to restrain, by administrative order, either directly or indirectly, an alleged violation of said paragraph (18) of Section 1.

[fol. 12] (3) Plaintiffs further aver that the theory upon which the Commission's order proceeds, viz., that plaintiffs have no right by tariff to include within the switching district of Fort Benning Junction tracks over which the Commission claims, erroneously as plaintiffs aver, plaintiffs

have no right to operate as a common carrier, or which can not be served by other common carriers, is untenable and without warrant of law, and that the order therefore exceeds the powers conferred upon the Commission by the Interstate Commerce Act or any other provision of law; that the order requiring said tariff to be stricken from the Commission's files is unlawful and violative of the plaintiffs' right to provide common carrier railroad service for reasonable compensation, and is therefore null and void.

(4) Plaintiffs further aver that there is otherwise no provision in the Interstate Commerce Act, or other warrant in law, empowering the Commission to annul or strike from its files the tariff filed by plaintiffs and pursuant to which they provide common carrier service to Fort Benning.

(5) Plaintiffs further aver that the agreement heretofore entered into between plaintiffs and Page and Harris, Exhibit 3 to this bill, grants to the plaintiffs the right to operate the Fort Benning track with their own crews and equipment if and when they so desire, that the right so granted has been expressly approved by the Secretary of War pursuant to authority vested in him, that consequently the plaintiffs have a present and continuing right to operate over said track with their own crews and equipment when they so elect, and that the finding of the Commission [fol. 13] to the contrary is in conflict with the conclusive evidence adduced before the Commission at the hearing upon which the order herein complained of was entered. Plaintiffs therefore aver that even though the theory hereinabove stated upon which the said order purports to be based may be sustainable in law, said order is nevertheless null and void for the reason that the factual condition essential to its application and operation, viz., that plaintiffs have no right to operate over the Fort Benning track as a common carrier, is without foundation, and contrary to the conclusive evidence, in the record.

(6) Plaintiffs further aver that the order herein complained of is null and void and of no effect for the further reason that, as is shown on its face, it does not prescribe the date as of which it shall become effective.

(7) Plaintiffs further aver that the tariff required to be stricken from the files by the order herein complained of

has been in effect, as hereinbefore stated, since December 4, 1933; that since that time they have transported a large volume of traffic to and from the receipt and delivery tracks within the Fort Benning military reservation pursuant to the provisions of the tariff; that a large volume of traffic will continue to move to and from the said military reservation in the future; that if and when said tariff is stricken from the files of the Commission plaintiffs will be without a lawfully filed tariff covering the transportation services heretofore rendered to and from the receipt and delivery tracks within the military reservation; that they will be thereby deprived of their lawful right to furnish such transportation services; and that the shippers and consignees heretofore served under said tariff will be deprived of the rates to and from the military reservation hereto- [fol. 14] fore in effect. Plaintiffs allege that as a consequence of the foregoing they will suffer large loss of revenue, that the shippers and consignees heretofore enjoying the services rendered under said tariff will be required to pay substantially higher rates on shipments to and from the Fort Benning military reservation than those now in effect, and that both the plaintiffs and the affected shippers and consignees will suffer irreparable injury for which they will have no plain, adequate or complete remedy at law, and for which they can obtain no redress or reimbursement whatsoever.

Plaintiffs therefore aver that this Court should enjoin the said order of February 5, 1935, from going into effect, and should grant them permanent relief therefrom.

IV

Wherefore, in consideration of the premises, and as plaintiffs are without remedy as aforesaid, and their only protection must arise from the equitable jurisdiction of this Court, plaintiffs pray:

(1) That a writ of subpoena ad respondendum issue out of and under the seal of this Court and be directed to the said defendant, the United States of America, requiring and commanding said defendant on a day certain therein to be specified to be and appear before this Court and to answer this bill but not under oath, its answer under oath being expressly waived.

(2) That this Court direct that due and proper notice of this bill and proceeding issue and be served forthwith, as [fol. 15] prescribed in the said Act of October 22, 1913, (28 U. S. C. A., Sections 41(28) and 43 to 48, inclusive).

(3) That a Court of three judges constituted as required by said Act of October 22, 1913, (28 U. S. C. A., Section 47), be immediately convened, and that said Court so constituted and convened, grant a temporary stay or suspension in whole of the operation of the said order of the Interstate Commerce Commission, Exhibit 1 to this bill, as provided in said Act of October 22, 1913, (28 U. S. C. A., Section 47), pending further hearing upon this bill of complaint; and that said Court, upon proper notice, grant plaintiffs' application here and now applied for, for an interlocutory injunction setting aside, suspending and restraining the enforcement, operation, and execution, in whole, of said order, Exhibit 1 to this bill, until final decision upon said application.

(4) That upon final hearing, this Court, constituted and convened as aforesaid, enter a final decree herein perpetually and forever enjoining the enforcement, operation and execution in whole of said order, Exhibit 1 to this bill, aforesaid, said decree to adjudicate, hold, order and declare that said order of the Interstate Commerce Commission of February 5, 1935, is without warrant of law, is beyond the lawful authority of the said Commission, and that it be set aside and forever annulled.

(5) That plaintiffs have and recover of the defendant the proper costs of this suit.

(6) That plaintiffs have such other, further and general relief as may be equitable.

[fol. 16] This is the first application for an injunction in this cause.

(S.) W. R. C. Cocke, Chas. T. Abeles, J. Randolph Anderson, Solicitors for Plaintiffs.

Duly sworn to by Chas. R. Capps. Jurat omitted in printing.

[fol. 17] EXHIBIT 1 TO BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 26483

H. D. POLLARD, as Receiver of Central of Georgia Railway Company,

v.

H. A. PAGE, JR., C. F. HARRIS, FORT BENNING RAILROAD COMPANY, et al.

Submitted December 5, 1934. Decided February 5, 1935

1. Schedules of Seaboard Air Line Railway extending the Fort Benning Junction switching district to include the receiving and delivery tracks at Fort Benning, Ga., found to be unlawful and ordered stricken from our files.
2. Page and Harris found to be operating as private contractors and not as a common carrier subject to the Act.

T. M. Cunningham and H. D. Pollard, for complainant.

W. R. C. Cocke, Charles T. Abeles, Moultrie Hitt, and B. Kibby Munson, for defendants.

Captain Ed. C. Betts, for War Department.

James J. Bethune, Ed. Gubernator, E. L. Hart, John B. Keeler, H. A. Puls and A. J. Ribe, for various interveners.

Report of the Commission

McMANAMY, Commissioner:

Exceptions were filed by complainant and defendants to the proposed report of the examiner, complainant replied to defendants' exceptions, and the parties were heard in oral argument.

[fol. 18] By complaint filed May 1, 1934, H. D. Pollard, as Receiver of the Central of Georgia Railway Company, hereinafter called the Central, alleges that by virtue of a tariff filed by the Seaboard Air Line Railway, hereinafter called the Seaboard, that company is in substance and effect

seeking to extend its operations over a line of railroad between Fort Benning Junction, Ga., and Fort Benning, hereinafter called the Fort Benning Line, later described, for which operation no certificate of public convenience and necessity has been granted; that the said tariff is unlawful and does not comply with Section 6(1) of the Act in that it is obscure and difficult to interpret and may be given several different meanings; that it does not state what, if any, charges are to be absorbed by the Seaboard or what, if any, compensation is to be paid to the contractors; and that it is unlawful in that under the circumstances there are no reciprocal arrangements between the Seaboard and the contractors. We are asked to declare the tariff unlawful, null and void and require the Seaboard to cancel it; to find and adjudge that Page and Harris are operating the Fort Benning line contrary to our order in Fort Benning R. Co. Acquisition, 193 I. C. C. 517, and to order them to cease and desist therefrom or otherwise enforce the order in the above case; to find and adjudge that the arrangements between the Seaboard and Page and Harris constitute a scheme or device to evade and set at naught the order in the Fort Benning case and that these defendants be ordered to cease and desist therefrom; and to fully investigate the relations between Page and Harris and the War Department with reference to the operations of the line of railroad and the arrangements between Page and Harris and the Seaboard with reference to said line.

Several shippers or representatives of shipping organizations intervened. Their principal interest was to maintain the present arrangements. The position of the War Department is that the operation of the Fort Benning line [fol. 19] by Page and Harris has been eminently satisfactory to the local military authorities and has resulted in a very considerable saving. It is stated to be the experience of that department that transportation facilities remotely controlled are not as responsive to the needs of the government as a transportation service immediately controlled, and that this independent operation of the railroad is superior and more to the advantage of the government than otherwise.

The two defendants filed substantially similar motions praying that we decline to take jurisdiction of the complaint because we had no power to entertain or decide it, and that

we are without authority to grant the relief sought. The motions were denied, but were renewed at the hearing.

The Federal government owns a line of railroad extending from the Fort Benning Military Reservation to connections at Fort Benning Junction with lines of the Central and the Seaboard, a distance of about 6.8 miles in Muscogee and Chattahoochee Counties, Georgia, together with certain tracks within the reservation. For about eight years the railroad was operated by the Central under a revocable license from the Secretary of War. On September 2, 1932, the license was revoked and since October 18, 1932, the line has been operated by H. A. Page, Jr. and C. F. Harris, as private contractors.

The Fort Benning Railroad, a Georgia corporation, was organized by Page and Harris about the time operations were begun by the latter, and this company applied to us for authority to operate the Fort Benning line as a common carrier. In Fort Benning R. Co. Acquisition, 193 I. C. C. 223, decided June 14, 1933, Division 4 issued the necessary certificate. Upon reargument, 193 I. C. C. 517, we reversed the finding of Division 4 and rescinded the certificate.

[fol. 20] The first report in the above case sets forth pertinent facts of record concerning the nature and extent of the military reservation and its rail traffic, the physical relationship of the area to the trunk lines, the history of the connecting lines and its operation, the terms of the proposed lease and operating agreement, and the contentions for and against the application. The record in that case was by stipulation made a part of the instant proceeding.

After our last decision the Fort Benning Railroad ceased to function, and Page and Harris continued as private contractors for the War Department the operation of the line of railroad in question. Under the contract the War Department agrees to pay Page and Harris $5.00 for each loaded car moving to or from the connection with the trunk lines, and $1,000.00 a month for the intra-terminal switching. Effective December 4, 1933, Receivers of the Seaboard published a tariff which provided that the Fort Benning Junction switching limits would include the receiving and delivery tracks at the Fort Benning Military Post. The Seaboard employed Page and Harris as its agents to perform the transportation service in handling cars between

Fort Benning Junction and the receiving and delivery tracks at Fort Benning, and pays them therefor $12.50 per car when the revenue is $25.00 or more per car, and when the revenue is less than $25.00, one half thereof.

Because of an extensive construction program extending through 1940, considerable material is handled for private contractors engaged in construction work at Fort Benning. Contracts with the government for the construction work were based on the fact that Page and Harris would charge $5.00 per car for transportation between Fort Benning Junction and the points of loading or unloading within the fort. Since the effective date of the above tariff, the Seaboard has paid Page and Harris for handling cars between [fol. 21] Fort Benning Junction and the delivery and receiving tracks within the fort, and the contractors have paid Page and Harris $5.00 for moving the cars beyond such delivery and receiving tracks to the points of loading or unloading. Thus, one of the effects of the Seaboard tariff is to relieve the government of making any payment to Page and Harris under its contract for service performed between Fort Benning Junction and the receiving and delivery tracks at Fort Benning. On traffic handled to Fort Benning Junction by the Central under government bills of lading consigned to the U. S. Government, the Central pays Page and Harris an amount equivalent to that paid by the Seaboard. The Central, however, has not established a tariff similar to that of the Seaboard, and since it does not publish rates to Fort Benning proper it accepts and delivers traffic intended for the fort, except on traffic moving under government bills of lading, at Fort Benning Junction. For moving traffic delivered at Fort Benning by the Central consigned to the government on other than government bills of lading the War Department pays Page and Harris under its contract previously referred to, $5.00 per car. On traffic consigned to independent contractors for delivery at the fort, Page and Harris usually collect $12.50 per car, although they may make a different charge in order to meet truck competition.

It is not necessary to review the various exchanges of correspondence in the record between the interested parties bearing on the question of operation of this railroad because they can have no material bearing on the final result.

Stripped of extraneous matter, the complaint brings in issue the following legal questions:

1. Has the Seaboard by virtue of its tariff extending the switching limits of Fort Benning Junction to include the receiving and delivery tracks at Fort Benning violated Section 1(18) of the Act?

[fol. 22] 2. Is the tariff unlawful because it extends the switching district to include tracks over which the Seaboard has no right to operate, because Page and Harris have that exclusive right under their contract with the government and cannot assign it without consent of the War Department and which consent has not been given?

3. Are Page and Harris acting as common carriers in violation of Section 1(18) of the Act in handling interstate traffic for hire without first obtaining a proper certificate?

Section 1(18) of the Act provides that no carrier by railroad subject to the Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate of convenience and necessity.

The fact that the Seaboard has by the tariff here considered extended its line over the government-owned railroad to the fort is not open to question. Does this constitute such an extension that a certificate is necessary, or does it fall within the exceptions in Section 1(22)?

It is not always easy to draw the line between instances where a certificate of public convenience and necessity is required for operation and other instances where no such certificate is necessary. See Piedmont & Nor. Ry. v. U. S., 286 U. S. 299. We are empowered by the statute to issue or refuse to issue such certificate upon determination of the facts in each case.

In Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266, 278, the Court said:

[fol. 23] If the purpose and effect of the new trackage is to extend substantially the line of the carrier into new territory, the proposed trackage constitutes an extension of

the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.

Fort Benning is not an industry and may more properly be described as a small city or town. It has a population of between 7,500 and 8,000, including officers and their families, enlisted men and their families and civilian employees and their families, and approximately 1,000 head of stock, horses and mules are stationed at the fort. The Army's Infantry School and Tank School are both at Fort Benning, and recently it has been used in connection with activities of Civilian Conservation Corps employees. The inbound and outbound freight consists of the many articles necessary to the subsistence of the inhabitants and equipment used in military activities in addition to a large amount of building material used in connection with erecting permanent buildings. About one-half of the inbound shipments, which total approximately 2,800 carloads per year, are moved on government bills of lading, the balance on commercial bills of lading. No industrial operations are conducted within the reservation. We are of opinion and find that the operation of the line between Fort Benning Junction and Fort Benning falls under the provisions of Section 1(18) of the Act and that before the Seaboard could lawfully operate the line in question a certificate of convenience and necessity would first have to be obtained.

The Seaboard maintains that the gravamen of the complaint is the assertion that the arrangement between the Receivers and Page and Harris constitutes an extension of the Receiver's line of railroad for which no certificate of public convenience and necessity has been obtained, and that the complaint is therefore seeking to invoke our aid [fol. 24] in restraining a plain violation of Section 1(18) of the Act, and that regardless of whether a certificate is necessary for the operation by the Seaboard between Fort Benning Junction and Fort Benning, we are without jurisdiction to afford relief or to take affirmative action at the instance of the complainant in an administrative proceeding, since the sole remedy is a preliminary suit for an injunction brought in a Court of competent jurisdiction. In support of this view the Seaboard refers to decision of the

Supreme Court in Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., supra, and Hild v. Chicago, N. S. & M. R. Co., 150 I. C. C. 367, wherein the Court and the Commission respectively affirm the proposition that injunctive relief provided by Section 1(20) affords the remedy for violations of Section 1(18), and that this remedy is exclusive, and that accordingly we cannot, either on our own motion or upon complaint assume the power in an administrative proceeding before us to restrain or punish infractions of this provision of the law. The Seaboard apparently takes the position that if we find the tariff unlawful it is because of a violation on its part of Section 1(18) of the Act.

The Central on the other hand contends that the situation is entirely different. It argues that our jurisdiction has been invoked as to this very railroad and what it is here seeking is to require the Seaboard and Page and Harris to cease and desist from violating the order in the Fort Benning case. The Seaboard was not a party to that order, but the Central contends that by publishing the tariff heretofore referred to and by the employment of Page and Harris as its agent to perform the transportation service over the line of railroad there considered the Seaboard and Page and Harris are now doing the very thing which we condemned by the decision in the Fort Benning case.

[fol. 25] Consideration has been given to the contention of the parties, but the tariff is unlawful on other grounds. At the time of the hearing the Seaboard had no right to operate over the track of the government between Fort Benning Junction and Fort Benning because of a prior contract entered into between the government and Page and Harris giving the latter the exclusive right, and which right could not be sublet without the consent of the government, which at the time of the hearing had not been granted. By the tariff under consideration the Seaboard undertook to extend the switching district of Fort Benning Junction to include the receiving and delivery tracks at Fort Benning. A carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be served by other common carriers through switching arrangements or otherwise. In New York Dock Ry. v. B. &

O. R. Co., 73 I. C. C. 656, 663, Division 2, considered a somewhat similar situation and stated:

* * * The Trunk lines provide for allowances to the dock company for services performed by the dock railway. The amounts, however, actually are paid to the dock railway. The trunk lines are therefore publishing rates to and from stations which are not on their lines and which cannot be reached by any line which is a party to their tariffs, or by any carrier to which an allowance for service beyond the eastern termini of the trunk lines is lawfully provided. Obviously, this is in violation of the requirements of the law, and our regulations with respect to the publication of rate schedules.

Our finding of unlawfulness of the tariff here under consideration, therefore, is not predicated on the fact that the Seaboard has violated Section 1(18), but rather on the fact that it has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier, and consequently it cannot pay [fol. 26] out of its line haul rates for a service which it is not legally obligated to perform and which it cannot perform except through the employment of the contractors with the government. A remedy for a violation of Section 1(18) is provided under Section 1(20).

At the hearing there was introduced in evidence an agreement entered into between the Seaboard and Page and Harris, under which the latter was to perform as agent for the Seaboard the service between Fort Benning Junction and the receiving and delivery tracks at Fort Benning. Paragraph 8 of that agreement provided that:

If, as and when the railway so desires, but subject to approval by the Secretary of War, the railway shall have the right to operate switching service with its own engines and crews over the tracks leased to and maintained by the contractors between Fort Benning Junction, Georgia, and the designated receiving and delivery track at the Fort Benning Military Post, the railway paying to the contractors a fair and reasonable compensation for the use of the contractors' facilities.

Paragraph 14 provided:

It is understood and agreed that the contractors reserve full right, subject to approval by the Secretary of War, to engage to render similar service for the Central of Georgia Railway and/or any other common carrier contracting therefor.

On exceptions to the proposed report, the Seaboard calls attention to the fact that under date of August 14, 1934, subsequent to the hearing, the Assistant Secretary of War endorsed on the original counterparts of the contract referred to the following:

Approved, subject to revocation at will, by the Secretary of War, as regards the provisions of paragraph (8) of the foregoing contract, subject to the reservation specified in paragraph (14) thereof, and further subject to the condition that Page and Harris, as government contract oper- [fol. 27] ators of the government owned Fort Benning Railway facility, shall ever hold themselves out as ready and willing to contract on similar terms with the Central of Georgia Railway and/or any other common carrier railroad.

The Seaboard contends that by this endorsement the War Department has given approval to that company to operate the Fort Benning line whenever it so desires. We do not so construe it. The endorsement was an approval of the terms of the contract, but granted no rights to the Seaboard to operate over the track in question. Manifestly the War Department could take no action on a subject matter which the Congress has placed under our exclusive jurisdiction.

While Page and Harris fail to hold themselves out as common carriers and thus do not meet one of the principal tests determinative of such service, the service rendered by them as agent for the Seaboard is common carrier service. Page and Harris have the ability to serve and apparently will serve under separate contracts any part of the public which has traffic carried over either the Seaboard or the Central intended for delivery on the line operated by them. However, all the trackage operated by Page and Harris is within the military reservation. The War De-

partment could, of course, operate its railroad for its own uses and also, if authorized by law, transport for others within the reservation, and as its agents Page and Harris can do the same thing. The question of the railroad being operated as a common carrier subject to the Act, having such status in its rate and other relations with connecting trunk lines, is an entirely different thing. The Central contends that the contract between Page and Harris and the War Department specifically provides that until the Fort Benning line should acquire the status of a common carrier under a certificate issued by us that they would act as agent for the government and receive their compensation therefrom, but that Page and Harris are acting without the [fol. 28] terms of the contract and that there is nothing in the contract which authorizes Page and Harris to impose any charge on contractors for spotting cars at the fort and calls particular attention to paragraph 2 of the contract which provides specifically that "no charge except as provided in paragraph 4 of this instrument will be assessed by the contractors or Fort Benning Railroad." The charges referred to in paragraph 4 are those hereinbefore referred to. Particular stress was laid upon the fact that the Acting Secretary of War advised the Central on March 6, 1934, that there had been no change in the contract, while at the hearing representatives of the War Department produced a document signed by a Brigadier General and dated December 27, 1933, purporting to be an amendment of the contract which gives Page and Harris authority to charge an additional $7.50 per car for switching and intraplant service on other than government freight. We are without power to pass upon the legality of the contract or upon charges made by Page and Harris in alleged pursuance thereof. The responsibility in that matter must rest with the parties thereto. The Central further contends that Page and Harris by acting as agents for the Seaboard and in charging contractors on traffic handled for them, are acting outside the scope of the contract, and that the ultimate result of making a charge against contractors is that such contractors add that charge to the contract price which the government pays, so that in the final analysis the government must pay the amount which the contractors pay to Page and Harris. This likewise is a matter not within our jurisdic-

tion except in so far as Page and Harris are being paid by the Seaboard.

Upon consideration of the record, we find that the Seaboard tariff which extends the Fort Benning Junction switching district to include the receiving and delivery tracks at Fort Benning is unlawful in violation of Section 6 [fol. 29] of the Act and should be stricken from the files of the Commission. We further find that Page and Harris are not common carriers subject to the Act, and the service they now perform within the government reservation at Fort Benning, except that for which they are being compensated by the carrier out of the line-haul revenue, is not subject to our jurisdiction.

The motions to dismiss are overruled. An order will be entered striking the above tariff from our files.

[fol. 30] Order

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 5th day of February, A. D., 1935.

No. 26483

H. D. Pollard, as Receiver of Central of Georgia Railway Company,

v.

H. A. Page, Jr., C. F. Harris, Fort Benning Railroad Company, and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and said Commission in said report having found the provision of the Seaboard Air Line Railway Company schedules, I. C. C. No. A-6826, Sixth Revised Page 139, effective December 4, 1933, that "Fort Benning Junction, Ga., switching limits

partment could, of course, operate its railroad for its own uses and also, if authorized by law, transport for others within the reservation, and as its agents Page and Harris can do the same thing. The question of the railroad being operated as a common carrier subject to the Act, having such status in its rate and other relations with connecting trunk lines, is an entirely different thing. The Central contends that the contract between Page and Harris and the War Department specifically provides that until the Fort Benning line should acquire the status of a common carrier under a certificate issued by us that they would act as agent for the government and receive their compensation therefrom, but that Page and Harris are acting without the [fol. 28] terms of the contract and that there is nothing in the contract which authorizes Page and Harris to impose any charge on contractors for spotting cars at the fort and calls particular attention to paragraph 2 of the contract which provides specifically that "no charge except as provided in paragraph 4 of this instrument will be assessed by the contractors or Fort Benning Railroad." The charges referred to in paragraph 4 are those hereinbefore referred to. Particular stress was laid upon the fact that the Acting Secretary of War advised the Central on March 6, 1934, that there had been no change in the contract, while at the hearing representatives of the War Department produced a document signed by a Brigadier General and dated December 27, 1933, purporting to be an amendment of the contract which gives Page and Harris authority to charge an additional $7.50 per car for switching and intraplant service on other than government freight. We are without power to pass upon the legality of the contract or upon charges made by Page and Harris in alleged pursuance thereof. The responsibility in that matter must rest with the parties thereto. The Central further contends that Page and Harris by acting as agents for the Seaboard and in charging contractors on traffic handled for them, are acting outside the scope of the contract, and that the ultimate result of making a charge against contractors is that such contractors add that charge to the contract price which the government pays, so that in the final analysis the government must pay the amount which the contractors pay to Page and Harris. This likewise is a matter not within our jurisdic-

tion except in so far as Page and Harris are being paid by the Seaboard.

Upon consideration of the record, we find that the Seaboard tariff which extends the Fort Benning Junction switching district to include the receiving and delivery tracks at Fort Benning is unlawful in violation of Section 6 [fol. 29] of the Act and should be stricken from the files of the Commission. We further find that Page and Harris are not common carriers subject to the Act, and the service they now perform within the government reservation at Fort Benning, except that for which they are being compensated by the carrier out of the line-haul revenue, is not subject to our jurisdiction.

The motions to dismiss are overruled. An order will be entered striking the above tariff from our files.

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This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and said Commission in said report having found the provision of the Seaboard Air Line Railway Company schedules, I. C. C. No. A-6826, Sixth Revised Page 139, effective December 4, 1933, that "Fort Benning Junction, Ga., switching limits

include the receiving and delivery tracks at Fort Benning Military Post'' to be unlawful:

It is ordered, That Sixth Revised Page 139 of said schedules, be, and it is hereby, stricken from the files of this Commission.

By the Commission.

George B. McGinty, Secretary. (Seal.)

(Here follows one photo, side folio 31)

SEABOARD AIR LINE RAILWAY COMPANY
L. R. POWELL, Jr., and HENRY W. ANDERSON, Receivers.

S. L. No. 1780.

V. C. C. No. 21.

SWITCHING

—AT POINTS IN—

FLORIDA.

Intra-Plant, Intra-Terminal and Inter-Terminal Switching.

Application of Rates and Rules Governing Same.

The Seaboard Air Line Railway will charge for switching service, as defined in Item 1, Fourteenth Revised Page 5, (except where otherwise provided for) the following charges: (Will not apply to switching service in connection with a line haul.)

	Cents per Car.
Intra-Plant Switching	720
Intra-Terminal Switching	720
Inter-Terminal Switching from private and assigned sidings and wharves on Seaboard Air Line Railway to interchange track with connecting lines on traffic destined for delivery to private and assigned sidings and wharves on connecting lines, within switching limits. (See Exceptions below)	720
Inter-Terminal Switching from interchange track with connecting lines to private and assigned sidings and wharves on Seaboard Air Line Railway within switching limits	270

The switching charges of connecting lines to be in addition.

These charges will include the switching of an empty car to be loaded and the return of the same car loaded, or the switching of a loaded car and return of the same car empty.

EXCEPTIONS.

Fernandina, Fla.

Seaboard Air Line Railway will charge 585 cents per car for switching naval stores within yard limits rehandled from Naval Stores Yards at Fernandina, Fla., to docks at Fernandina, Fla., for delivery to vessels.

Tampa, Fla.

The charge for switching cars from warehouses located on the Seaboard Air Line Railway tracks at Seddon Island to interchange tracks of the Atlantic Coast Line Railroad will be 450 cents per car. Switching charge of the Atlantic Coast Line Railroad will be in addition.

The Seaboard Air Line Railway will make no charge for switching empty tank cars between railroad's, industrial's or car owner's storage tracks, and industrial's or car owner's loading or unloading, storage, shop, inspection, repair, or cleaning tracks, or between industrial's or car owner's (and between industrial's and car owner's) loading or unloading, storage, shop, inspection, repair, or cleaning tracks, or for ascertaining weights for billing purposes.

SWITCHING AT FORT BENNING JUNCTION, GA.

Reciprocal Switching.

Fort Benning Junction, Ga., switching limits will include the receiving and delivery tracks at the Fort Benning Military Post.

↓ Denotes Reduction.

Issued November 3, 1933.

Issued by
R. H. EBERLY,
General Freight Agent,
Coca-Cola Building,
Norfolk, Va.

Effective December 4, 1933.

[fol. 32] EXHIBIT 3 TO BILL OF COMPLAINT

This Agreement, Made this 7th day of June, 1934, between L. R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, hereinafter called the "Railway", and H. A. Page, Jr. and C. F. Harris hereinafter called the "Contractors";

Witnesseth:

Whereas, the Contractors have under lease to them all the Government-owned railroad tracks extending from a point of connection with the Seaboard Air Line Railway at Fort Benning Junction leading to and from the inhabited portion of the Fort Benning Military Reservation known and designated as the Fort Benning Military Post; and also all other standard gauge railroad tracks in said Fort Benning Military Reservation; and said Contractors are under an operating contract with the Government to render all strictly intra-Reservation railroad service, and also to switch all cars between Fort Benning Junction and the Fort Benning Military Post as a private carrier for the Government until switching service by a common carrier railroad or railroads is established to and from the said inhabited portion of the Fort Benning Military Reservation and the outside world, and

Whereas, under tariffs published by the Railway the Fort Benning Junction switching limits include a certain designated receiving and delivery track within the Fort Benning Military Post; and

Whereas, the parties hereto desire to cooperate in order that through the facilities leased to the Contractors there may be made available adequate switching service for the [fol. 33] efficient and economical delivery and receipt of shipments of freight transported by the Railway to and from the Fort Benning Military Post; and

Whereas, to this end the parties desire to enter into an agreement with respect to the performance by the Contractors of certain services in connection with the receipt and delivery of such shipments for the switching of the same for the Seaboard Air Line Railway.

Now, Therefore, This Agreement Witnesseth, That in consideration of the premises and of the covenants and agreements to be respectively observed, kept and performed

by the parties hereto, it is mutually stipulated and agreed by and between the parties hereto as follows:

(1) The Contractors shall provide and maintain at their sole cost and expense such tracks, right of way, motive power, forces and equipment as may be necessary for the prompt switching, receipt and delivery of freight and freight cars at and between the Railway's Fort Benning Junction, Georgia, station and the designated receiving and delivery track at the Fort Benning Military Post, and such facilities adjacent to such track for the unloading of freight as may be necessary to permit prompt release and avoid undue detention of freight cars.

(2) The Contractors shall furnish a side track or side tracks at Fort Benning Junction and receive from the Railway thereon and with reasonable dispatch switch and deliver for the Railway to the designated receiving and delivery track within the Military Post all carload and less-than-carload freight offered the Contractors by the Railway at Fort Benning Junction, and shall likewise receive for the Railway and deliver to the Railway at Fort Benning Junction all carload and less-than-carload freight offered by shippers at the Military Post for movement by the Railway [fol. 34] from its Fort Benning Junction station. The Contractors shall receive from the Railway and promptly switch to the designated receiving track all empty freight cars required for outward loading, and shall promptly return to the Railway at Fort Benning Junction all freight cars received loaded from the Railway and made empty at the Reservation.

(3) In performing the services herein provided for the Contractors shall act as agent of the Railway and as such will observe and comply with all tariffs, laws, rules and regulations to which the Railway would be subject if it were itself performing such services. The Contractors shall keep such records and accounts and make such collections of money as may be required by the Railway, and shall perform for the Railway all of the necessary duties incident to receiving and delivering interstate or intrastate freight traffic. All moneys which the Contractors may collect for the account of the Railway shall be remitted to the Railway in full not later than the close of the week during which the collections are made.

(4) The Contractors shall be responsible to the Railway for all freight while in their possession. Freight switched into the Military Post shall be deemed to be in the possession of the Contractors from and after the loaded cars have been attached to the Contractors' locomotive on the siding or sidings provided by the Contractors at Fort Benning Junction, and freight switched by the Contractors out of the Military Post shall be deemed in their possession until the loaded cars are placed on the said siding or sidings at Fort Benning Junction and the locomotive detached therefrom.

(5) The Contractors shall, and do hereby, indemnify the Railway against, and save it harmless from, all liability, damage, loss, cost or expense of any kind arising from or by reason of:

[fol. 35] (a) A breach of any of the covenants or conditions required by this agreement to be performed or observed by the Contractors.

(b) The death of or injuries to any of the Contractors' officers or employees or damage to or loss of their property, the death of or injuries to third parties or damage to or loss of their property, when such death, injuries, loss or damage is occasioned by or in the course of the performance of the services covered by this agreement.

(c) The loss of or damage to freight while in the possession of the Contractors. The term "damage" shall include physical injury and depreciation of market value for which the Railway may be liable as a common carrier of freight.

(6) The Contractors shall at their own cost carry adequate insurance with a company or companies satisfactory to the Railway protecting the Contractors and the Railway from loss or damage by fire to freight handled by the Contractors under this agreement, and shall maintain such insurance in effect throughout the term of this agreement.

(7) The Contractors shall, contemporaneously with the execution of this agreement, furnish and maintain during the term of this agreement, a corporate surety bond in an amount and with a company satisfactory to the Railway, conditioned upon the prompt and faithful performance by

the Contractors of all the covenants, terms and conditions of this agreement and the full and faithful discharge of the duties and obligations of the Contractors hereunder.

(8) If, as and when the Railway so desires, but subject to approval by the Secretary of War, the Railway shall have the right to operate switching service with its own engines and crews over the tracks leased to and maintained by the Contractors between Fort Benning Junction, Georgia, and the designated receiving and delivering track at the Fort Benning Military Post, the Railway paying to the Contractors a fair and reasonable compensation for [fol. 36] the use of the Contractors' facilities.

(9) The Railway shall deliver to the Contractors in standard freight cars all carload and less-than-carload freight which the Railway desires the Contractors to switch from Fort Benning Junction into the Military Post, and to provide such empty cars as may be required for the outbound switching of freight offered by shippers at the Military Post. The Contractors shall furnish the Railway with reasonable notice of all cars which may be required.

(10) The Railway shall pay the Contractors for the services rendered under this contract Twelve and One-half Dollars ($12.50) for each loaded or partly loaded car handled by the Contractors in either direction. No addition compensation shall be paid for the switching of empty cars. In the event, however, that the gross revenue earned by the Railway for the transportation of any car delivered to or received from the Contractors is less than Twenty-five Dollars ($25.00) the Contractors shall receive for the switching of such car an amount equal to but not exceeding fifty per cent (50%) of the gross revenue so earned by the Railway.

(11) The compensation to which the Contractors are entitled hereunder shall be paid by the Railway in weekly periods not later than seven days after the close of each week.

(12) This agreement may be cancelled by either party by six months' notice in writing. Subject to such right of cancellation and to abrogation or modification in whole or in part by a lawful order of a public regulatory body or court of competent jurisdiction, this agreement shall remain in

force and effect for so long as the Contractors have the right to operate the track between Fort Benning Junction and the Fort Benning Military Post.

[fol. 37] (13) This agreement shall be retroactive to and be in force and effect from and after December 4, 1933.

(14) It is understood and agreed that the Contractors reserve full right, subject to approval by the Secretary of War, to engage to render similar service for the Central of Georgia Railway and/or any other common carrier contracting therefor.

(15) The provisions of this agreement shall be binding upon the legal representatives, successors or assigns of the Contractors, and shall be binding upon and inure to the benefit of the Receivers of the Seaboard Air Line Railway (as Receivers but not individually) and their successors, the Seaboard Air Line Railway Company and its successors, the railroad corporation which may, after the termination of the receivership of the Seaboard Air Line Railway Company, control and operate the line of railroad and appurtenant physical properties which now serve Fort Benning Junction, Georgia, and the successors of such railroad corporation.

In Witness Whereof, the parties hereto have caused this agreement to be executed the day and year first above written.

L. R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, by C. R. Capps, Chief Traffic Officer.

Witnessed: M. A. Calhoun, R. W. Morris.

[fol. 38] H. A. Page, Jr. and C. F. Harris, Trading as Page & Harris, by H. A. Page, Jr.

Witnessed: C. F. Harris, Moultrie Hitt.

Aug. 14, 1934.

Approved, subject to revocation at will by the Secretary of War, as regards the provisions of paragraph (8) of the foregoing contract, subject to the reservation specified in paragraph (14) thereof, and further subject to the condition that Page and Harris, as Government contract oper-

ators of the Government owned Fort Benning Railwa facilities, shall ever hold themselves out as ready and wil ing to contract, on similar terms, with the Central o Georgia Railway and or any other common carrier rai road.

Harry H. Woodring, The Assistant Secretary of Wa

[fol. 39] EXHIBIT 4 TO BILL OF COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

H. D. POLLARD, as Receiver of Central of Georgia Railway Company,

vs.

H. A. PAGE, JR., C. F. HARRIS, FORT BENNING RAILROAD COMPANY, and L. R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company

COMPLAINT

The complaint of the above-named complainant respectfully shows:

1. Complainant was appointed Receiver of all the property and assets of Central of Georgia Railway Company under order of the United States District Court for the Southern District of Georgia in the equity suit of Alabama Fuel & Iron Company v. Central of Georgia Railway Company, and is now in possession of all of the properties and assets of the said Railway Company and is operating the same. Complainant is a common carrier engaged in interstate commerce and is subject to the Interstate Commerce Act.

2. The defendants L. R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company were appointed such Receivers under orders issued from the United States District Court for the Eastern District of Virginia, in the equity case of Bethlehem Steel Company v. Seaboard Air Line Railway Company, and are now in possession of the properties of Seaboard Air Line Rail-
[fol. 40] way Company, and are operating the same. The

said Receivers are common carriers in interstate commerce and subject to the Interstate Commerce Act.

3. The defendant Fort Benning Railroad Company is a railroad corporation created by and existing under the laws of the State of Georgia. The defendants H. A. Page, Jr. and C. F. Harris own substantially all of the stock of the Fort Benning Railroad Company. The Fort Benning Railroad Company was incorporated by the said Page and Harris for the purpose of operating the Government-owned railroad between Fort Benning Junction, Georgia, and Fort Benning, Georgia and the tracks in the Fort Benning Military Reservation under and in pursuance of two contracts, hereinafter referred to, between the said Page and Harris and the War Department.

4. The defendant Page and Harris entered into a contract with the War Department dated September 9, 1932, whereby the War Department leased to them the Fort Benning Railroad and its appurtenances and certain personal property for a consideration of $100.00 per annum. The said Fort Benning line forms a junction with the lines of the Central of Georgia Railway Company and the lines of the Seaboard Air Line Railway Company at Fort Benning Junction, Georgia, and runs thence a distance of about six miles to Fort Benning, Georgia, which is a military reservation, and there are several spur tracks in the military reservation connected with the line from Fort Benning Junction to the fort. The said Fort Benning line and its spur tracks are owned by the Government and are used for the purpose of transporting freight to and from the Fort Benning military reservation.

5. The said Page and Harris entered into another contract dated October 16, 1932, with the United States of America, represented by the Quartermaster Corps of the [fol. 41] Army, whereby the said Page and Harris agreed that they would organize a railroad corporation to be known as the Fort Benning Railroad Company and that the said Railroad Company would apply for a certificate of public convenience and necessity from the Interstate Commerce Commission to engage as a common carrier in interstate commerce, and that when the certificate was granted, the Fort Benning Railroad Company would handle all freight for the Government and others between Fort Ben-

ning and Fort Benning Junction, where the Government railroad connects with the tracks of the Central of Georgia Railway Company and Seaboard Air Line Railway Company. This contract further provides that when the Fort Benning Railroad Company should receive its certificate of public convenience and necessity that it would use its best efforts to establish through routes via the Fort Benning Railroad Company and make rates to Fort Benning, Georgia, as low or lower than the rates applied to Fort Benning Junction. The contract further provided that until the Fort Benning Railroad Company received its certificate of public convenience and necessity that the said Page and Harris would act wholly in the capacity of private contractors for the Government and as the agent of the Government and not as a common carrier, and would transport all freight between Fort Benning, Georgia, and Fort Benning Junction, for which the said Page and Harris were to be paid by the Government $5.00 per loaded car. Paragraph 4 of this contract provides that the said Page and Harris or the Fort Benning Railroad Company would operate an intra reservation facility for which the Government was to pay Page and Harris $1,000.00 per month, and the contract provided in this connection that no charge for said intra reservation services, except as provided in the fourth paragraph of the contract, should be assessed either by Page and Harris or the Fort Benning Railroad Company. [fol. 42] Copies of the two contracts between said Page and Harris and the Government are attached to the application of Fort Benning Railroad Company for certificate of public convenience and necessity hereinafter referred to, and the said copies of said contracts are referred to for further particulars.

6. Fort Benning Railroad Company made application to the Interstate Commerce Commission (Finance Docket No. 9709) under paragraphs 18 to 21, inclusive, of Section 1 of the Interstate Commerce Act for a certificate of public convenience and necessity for the acquisition and operation of the said Fort Benning Railroad. The Interstate Commerce Commission on the 4th day of October, 1933, entered its order on said application denying the certificate. Special attention is called to the record of the proceedings in said Finance Docket No. 9709.

7. Since November 27, 1932, the said Page and Harris have been in possession of the Fort Benning Railroad and the tracks at the Fort Benning military reservation under the contracts hereinbefore set forth; and up to January 6, 1934, plaintiff alleges, on information and belief, that either the said Page and Harris, or Fort Benning Railroad Company, required all shippers of freight over the Fort Benning line to pay to them $5.00 per car, and that the War Department paid to the said Page and Harris $5.00 per car for all carload freight carried over the Fort Benning line for account of the Government.

8. Receivers of the Seaboard Air Line Railway Company issued and filed with the Interstate Commerce Commission November 3, 1933, their tariff Sixth Revised Page 139 to I. C. C. No. A-6826, effective December 4, 1933, which reads as follows:

[fol. 43] "Switching at Fort Benning Junction, Ga.

Reciprocal Switching

Fort Benning Junction, Ga., switching limits will include the receiving and delivery tracks at the Fort Benning Military Post."

This tariff is at the bottom of a sheet which relates principally to switching at points in Florida. Complainant did not learn of the issuance and filing of this tariff Sixth Revised Page 139 to I. C. C. No. A-6826, promulgated by the Receivers of the Seaboard Air Line Railway, until a few days after it had gone into effect, when it was for the first time informed of the tariff by Mr. Charles R. Capps, Chief Traffic Officer of Receivers of the Seaboard Air Line Railway. Under the Articles of Association of the Southern Freight Association, of which both Receivers of the Seaboard Air Line Railway and Receiver of the Central of Georgia Railway are members, it is provided in Article VII of said Articles of Association that:

"(a) All proposals for changes in rates, rules and regulations made by member or other lines shall be addressed to the Chairman, and copies in sufficient number furnished for distribution to member lines. The Chairman may him-

self initiate proposals. Such proposals shall at once be distributed by the Chairman to member lines, shall bear the Association's submittal number, which numbers shall run consecutively and shall carry notice that unless objections thereto are received within fifteen (15) days from the date of submittal, none shall be assumed held."

Article VIII of said Articles of Association provide that:

"(a) Each member line through its Chief Traffic Officer reserves the right to take separate and independent action with respect to any rate, rule or regulation considered by the General Committee or submitted by the Chairman in a mail proposal; or if any member line shall determine that any rate, rule or regulation it may believe necessary to establish is of such emergency character as to demand immediate disposition it may give notice through the Chairman of intention to establish such rate, rule or regulation, provided:

[fol. 44] 1. That prior to the establishment of a change in any rate, rule or regulation it is discussed in conference or by correspondence with the Chief Traffic Officer of the member lines whose revenues are affected. * * *

2. That not less than ten (10) days' notice shall be given before publication."

The Receivers of the Seaboard Air Line Railway did not comply with the above quoted articles of the Southern Freight Association, and therefore complainant had no notice through that source.

9. There is on file with the War Department a tariff issued by the Receivers of the Seaboard Air Line Railway January 23, 1934, to become effective February 23, 1934, which is identified as Original Page 140-A to I. C. C. No. A-6826, which is identical in all respects with the Sixth Revised Page 139 to I. C. C. No. A-6826, quoted in paragraph next above except that the new tariff has dropped the word "Reciprocal" before the word "Switching", and the new tariff also carries notice as follows:

"For switching at Fort Benning Junction, Georgia, in effect prior to the effective date hereof, see Sixth Revised Page 139."

Complainant has been unable to ascertain whether or not this last-mentioned tariff has actually been filed with the Interstate Commerce Commission. Upon application to the Tariff Section of the Commission for a copy of this last-mentioned tariff on February 2, 1934, it was unable to furnish us with a copy and it could not be definitely ascertained whether or not the tariff had been filed with the Commission.

10. February 6, 1934, there came to the notice of complainant a printed document dated Fort Benning, Ga., January 3, 1934, which complainant is advised was put forth by the said Page and Harris and distributed among shippers of freight over the Fort Benning Railroad. The said document is as follows:

[fol. 45] "H. A. Page, Jr. C. F. Harris.

Page & Harris

Private Contract Operators of Fort Benning Government Railroad

Notice

(The Government railroad in the Fort Benning Military Reservation is not a common carrier and Page & Harris operate it entirely as private contractors in individual relation to each Government contractor they may agree to serve, hence their liability is only that of non-common carrier private contractors.)

Memo as Basis for a Contract

Fort Benning, Ga., January 3, 1934. (R)

To All Concerned:

The private railroad operated by Page & Harris does not, and will not, serve the general public, and only holds itself out to serve the needs of the Government in the Fort Benning Military Reservation, which however includes those who have contracts with or for the benefit of the Government, and with whom Page & Harris will contract for service only as a private carrier.

For the benefit of contractors and/or prospective contractors for Government work in the Fort Benning Mili-

tary Reservation the probable basis of charge (subject to specific agreement when the occasion actually arises) for private service to them by Page & Harris will be as follows:

For movement of an entire car and its contents and return of the empty car—

(1) Between Fort Benning Junction and any related spotting location in the Fort Benning Military Reservation which may be available, and on which the common carrier service of the Central of Georgia has ended or has not begun, $12.50 per car.

(2) Between the point designated as the "Receiving and Delivering Tracks" at the Fort Benning Military Post and any selected spotting location which may be available, and on which the common carrier service of the Seaboard Air Line Railway has ended or has not begun, $5.00 per car with contents of 10,000 lbs. or over.

(3) Less car lots of under 10,000 lbs. on which common carrier service has ended or has not begun, 12½ cents per hundred pounds, with a minimum charge of 25 cents for any one lot."

[fol. 46] 11. Fort Benning Railroad Company owns no property. Complainant alleges, on information and belief, that its capital stock has never been issued and that it was never organized as a Corporation. It is altogether owned or controlled by the said Page and Harris, and, insofar as the operations of this Fort Benning line are concerned, Page and Harris are identical with Fort Benning Railroad Company. The application for the issuance of the certificate of public convenience and necessity to Fort Benning Railroad Company was in substance and effect the application of the said Page and Harris. The denial by the Commission of a certificate to the Fort Benning Railroad Company is in substance and effect a denial of certificate of public convenience and necessity to said Page and Harris because of their identity with Fort Benning Railroad Company. The said Page and Harris, in cooperation with the Receivers of the Seaboard Air Line, are in substance and effect doing precisely the same things which are prohibited by the order of the Commission denying the application of Fort Benning Railroad Company for said certificate. The reason why the Commission denied the application of the

Fort Benning Railroad, as plainly appears from the opinion of the Commission, is that the Fort Benning line was in substance and effect a plant facility, and that it was contrary to the public interest to use it as a common carrier and to absorb, through its medium as a common carrier a portion of the earnings of railroad carriers operating up to Fort Benning Junction. Under the plan now adopted by the said Page and Harris and the Receivers of the Seaboard Air Line Railway, the said Page and Harris are operating the Fort Benning line as common carriers, and the Receivers of the Seaboard Air Line are paying to Page and Harris for the carriage of freight over the Fort Benning line.

12. The said Page and Harris are pretending to be operating the Fort Benning line as agents of the Government. [fol. 47] But upon the contrary, they are operating as common carriers and not as agents of the Government. They are carrying not only for the Government, but also for all persons who offer any freight destined to or from Fort Benning. The said freight is paid to Page and Harris for themselves and not to them as agents for the Government, nor do Page and Harris account to the Government in any manner for the freight so paid to them. The switching charges which the Receivers of Seaboard Air Line Railway propose to absorb under their tariff (I. C. C. A-6826, quoted above), will be paid by the Receivers of Seaboard Air Line Railway to Page and Harris and not to the Government, and Page and Harris will not be accountable therefor to the Government. Complainants allege on information and belief that the amount of the said switching charges which the Receivers of Seaboard Air Line Railway will pay to Page and Harris is $12.50 per car. According to the document promulgated by Page and Harris and quoted in full above, shippers of freight destined to Fort Benning via Central of Georgia Railway Company will be charged by Page and Harris $12.50 a car and 12½ cents per 100 pounds for less-than-carload shipments. This money is likewise paid to Page and Harris for their own account and not for account of the Government. The result of all of this is that the Receivers of the Seaboard Air Line Railway are paying to the said Page and Harris $12.50 on traffic destined to Fort Benning. The order denying the application of

Fort Benning Railroad Company for a certificate was intended to prevent this very thing. If the Receiver of Central of Georgia Railway Company does not shrink his rate on traffic destined to Fort Benning to the same extent as the Receivers of Seaboard Air Line Railway have shrunk their rate, the Receiver of the Central of Georgia Railway will necessarily be eliminated as a competitor for this traffic.

[fol. 48] 13. The Tariff I. C. C. No. A-6826 (quoted above) issued by Receivers of Seaboard Air Line Railway is unlawful and invalid in the following particulars:

(a) That said tariff and the arrangements above stated between the Receivers of the Seaboard Air Line Railway and the said Page & Harris constitute a scheme and device to unlawfully avoid and break down the order of the Interstate Commerce Commission issued in Finance Docket No. 9709, in the matter of the application of Fort Benning Railroad Company for a certificate of public convenience and necessity.

(b) By virtue of this tariff, the Receivers of Seaboard Air Line Railway are, in substance and effect, seeking to extend their operation over a line of railroad from Fort Benning Junction to Fort Benning, for which operation no certificate of public convenience and necessity has been granted.

(c) The said tariff is unlawful and does not comply with paragraph 1 of section 6 of the Act to Regulate Commerce, in that the tariff is obscure and difficult to interpret and may be given several different meanings; in that the tariff does not state what, if any, charges are to be absorbed by the Receivers of the Seaboard Air Line Railway, or what, if any, compensation is to be paid to Page and Harris.

(d) The said tariff is further unlawful in that, under the circumstances, there are no reciprocal arrangements between the Receivers of the Seaboard and Page and Harris.

14. The complainant operates five lines of railroad into Columbus, Georgia, which is about four miles from Fort Benning Junction. Complainant's line of railroad running from Americus to Columbus connects with the Fort Benning line at Fort Benning Junction. Complainant has engaged in hauling traffic to and from Fort Benning both for the Government and for contractors doing construction work at Fort Benning military reservation, and for others

at said reservation, and complainant therefore has a material interest in the matter set forth in this complaint.

[fol. 49] 15. In view of the fact that there is a large amount of construction work now in progress at Fort Benning and that both the Government and private contractors are moving a large quantity of freight into Fort Benning and that the traffic is competitive as between the Receivers of the Seaboard Air Line Railway and the Receiver of the Central of Georgia Railway, complainant in a separate petition has asked the Commission for authority under Section 6 of the Act to Regulate Commerce to file a tariff on less than statutory notice substantially similar to the tariff filed by the Seaboard Air Line Railway so that pending determination of the issues made by this complaint, which will necessarily take some time to determine, complainant may not be at a disadvantage in competing with the Seaboard Air Line Railway for this traffic. Complainant, on advices from the War Department that the Receivers of Seaboard Air Line Railway were absorbing the charges at the Fort Benning Railroad on all Government freight, has notified the War Department that it would meet the competition of the Seaboard Air Line Railway in this respect.

Wherefore Complainant Prays:

(1) That the tariff (I. C. C. A-6826) issued by Receivers of Seaboard Air Line Railway may be declared unlawful and null and void; and that the said Receivers may be required to cancel it.

(2) That the Commission will find and adjudge that the defendants Page and Harris are operating the Fort Benning line contrary to the order of the Commission issued on the application of Fort Benning Railroad Company in Finance Docket 9709, and will order them to cease and desist therefrom; or will otherwise enforce its order.

(3) That the Commission will find and adjudge that the arrangements between the Receivers of the Seaboard Air Line Railway and the said Page and Harris constitute a [fol. 50] scheme or device to evade and set at naught the order of the Commission issued on the application of Fort Benning Railroad Company in Finance Docket 9709; and that they be ordered to cease and desist therefrom; or that

the Commission will otherwise enforce against them and each of them its said order.

(4) That the Commission will fully investigate the relations between the defendants Page and Harris and the War Department, with reference to the operations of the Fort Benning Railroad, and also the arrangements between the said Page and Harris and the Receivers of Seaboard Air Line Railway with reference to the said Fort Benning Railroad.

(5) That such other and further order or orders may be made as the Commission may consider proper in the premises.

[fol. 51] Dated at Savannah, Georgia, February 13, 1934.

H. D. Pollard, as Receiver of Central of Georgia Railway Company, by T. M. Cunningham, General Counsel. P. O. Address 26 Bryan Street, East, Savannah, Georgia.

STATE OF GEORGIA,
County of Chatham:

H. D. Pollard, being duly sworn, deposes and says that he, as Receiver of Central of Georgia Railway Company, is complainant in the above-entitled proceeding; that he has read the foregoing complaint, and knows the contents thereof; that the same are true as stated, except as to matters and things stated on information and belief, and that as to those matters and things he believes them to be true.

H. D. Pollard.

Subscribed in my presence and sworn to before me by the affiant above named this 13th day of February, 1934. F. S. Baggett, Notary Public, Chatham County, Georgia. My commission expires December 20, 1936. (Seal.)

[fol. 52] EXHIBIT 5 TO BILL OF COMPLAINT

Docket No. 26483

H. D. POLLARD, as Receiver of Central of Georgia Railway Company,

versus

H. A. PAGE, JR., C. F. HARRIS, FORT BENNING RAILROAD COMPANY, et al.

Petition for Reargument and Reconsideration and for Suspension or Vacation of the Order Entered Herein

Come now the defendants, L. R. Powell, Jr. and Henry W. Anderson, Receivers of the properties and assets of Seaboard Air Line Railway Company, in the above-entitled proceeding, and respectfully petition the Commission to grant a reargument therein and a reconsideration thereof, and in support of said petition respectfully show:

(1) In substance and effect the complaint charges a violation of and seeks relief from an alleged violation of paragraph (18) of Section 1 of the Interstate Commerce Act. The case was tried at the hearing, and was argued orally and on briefs on this theory. The report and order, on the other hand, are based upon a principal wholly unrelated and unresponsive to the charges of the complaint, viz.: that the tariff complained of is unlawful because it publishes rates to and from a station not on these defendants' line and which is reached only by a track over which the defendant Receivers have no right to operate. (Sheet 9). This principle, of far reaching consequences, while referred to in the tentative report, was not assigned as the controlling reason for the conclusion reached therein, was subordinated at the hearing and in the arguments to the question of the right of the complainant to seek relief from [fol. 53] the Commission for a violation of Section 1(18), is announced and relied upon in the final report and order without reference to or citations of controlling judicial decisions, and for these reasons, failed, throughout the proceedings, to receive the consideration which its importance requires.

(2) The ruling of the report and order that the tariff therein condemned is unlawful because it publishes rates to and from a station not on the line of these defendants and which is reached only by a track over which they have no no right to operate is erroneous, and contrary to established legal principles.

(3) Even if it be conceded, although these defendants deny, that the ruling referred to in the preceding paragraph is a correct statement of the law, your petitioners aver, and will, if permitted, show to the Commission that the finding of the report that the defendant Receivers have no right to operate over the track serving Fort Benning proper is erroneous and contrary to fact, and is based upon a misinterpretation of the approval by the Secretary of War of the contract between your petitioners and Page and Harris and upon a misconception of the intent, meaning and legal effect of said approval. Your petitioners further aver, and will, if permitted, show to the Commission that by endorsing his approval of paragraph (8) of said contract between your petitioners and Page and Harris the Secretary of War conferred upon your petitioners the present right to operate over the track between Fort Benning Junction and the military reservation if and when they so desire without further authority from or approval by the Secretary of War or any other person; and that the finding to the contrary, which underlies and constitutes the sole support for the conclusion that the tariff is unlawful, is erroneous.

Wherefore, your petitioners, averring for the reasons hereinabove stated that the order that the defendants' tariff is unlawful and requiring that it be stricken from [fol. 54] the files of the Commission is based upon erroneous conclusions as to a principle of law which have been inadequat-ly argued and considered, and upon a plain misapprehension as to a fact, to which the report and order assign vital importance, pray:

(a) That the above entitled case be reopened for further argument and reconsideration.

(b) That the order entered therein dated February 5, 1935, be suspended or, if already in effect, vacated pending such further argument and reconsideration.

(c) That the Commission enter such further order or orders in the premises as to it may seem reasonable and just.

Dated at Norfolk, Virginia, February 19, 1935.

L. R. Powell, Jr., and Henry W. Anderson, Receivers of the Properties and Assets of Seaboard Air Line Railway Company, by W. R. C. Cocke, Chas. T. Abeles, Their Counsel. Seaboard Air Line Bldg., Norfolk, Virginia.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed to their respective counsel of record.

Dated at Norfolk, Virginia, this 19th day of February, 1935.

Chas. T. Abeles, of Counsel for L. R. Powell, Jr. and Henry W. Anderson, Receivers of the Properties and Assets of Seaboard Air Line Railway Company.

[fols. 55–57] EXHIBIT 6 TO BILL OF COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of March, A. D., 1935.

No. 26483

H. D. POLLARD, as Receiver of Central of Georgia Railway Company,

v.

H. A. PAGE, JR., C. F. HARRIS, FORT BENNING RAILROAD COMPANY, et al.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petition of defendants L. R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, dated

February 19, 1935, for reargument, reconsideration, and suspension or vacation of the order herein:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 58] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING A COURT OF THREE JUDGES AND FIXING THE TIME AND PLACE FOR HEARING APPLICATION FOR INTERLOCUTORY INJUNCTION, ETC.—Filed March 26, 1935

It appearing to the Court from the verified bill of complaint herein that this is a proceeding for an interlocutory and permanent injunction enjoining the enforcement, operation and execution, in whole, of an order of the Interstate Commerce Commission, and that under the provisions of the Act of Congress of October 22, 1913, 28 U. S. C. A., Section 47, the hearing of said proceeding is required to be before a court consisting of three judges, one of whom must be a circuit judge.

Now, therefore, it is Ordered, that the following judges be called to my assistance to hear and determine this proceeding, to-wit: United States Circuit Judge Samuel H. Sibley and United States District Judge Bascom S. Deaver.

It is further Ordered: That the application for interlocutory injunction herein be set for a hearing before said court so constituted on the 29th day of April, 1935, at ten o'clock a. m., in the City of Savannah, in the State of Georgia.

Further Ordered: That said time and place there will also be had the final hearing, as basis for a final decree in said cause, unless cause to the contrary be shown at said time.

Ordered that notice of said hearing be served upon the Interstate Commerce Commission and the Attorney General of the United States not less than five days prior to the date herein fixed therefor.

This 23rd day of March, 1935.

(S.) Wm. H. Barrett, United States District Judge, Southern District of Georgia.

[File endorsement omitted.]

[fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed April 26, 1935

First Defense

United States of America, defendant in the above entitled cause, for its First Defense to the bill of complaint filed therein against it says:

1. The bill of complaint complains of the action of the Interstate Commerce Commission in striking from its files a certain page of schedules and tariffs filed by plaintiffs with the Commission, and the entry of its order of February 5, 1935, consummating that action. The Commission's act of striking the tariff from its files was completed and accomplished on February 5, 1935. The action having already been completed and accomplished, this suit in equity will not lie.

2. The Commission's order of February 5, 1935, neither requires plaintiffs to do nor to refrain from doing anything; nor does it place upon them any command or compulsion, nor does it contain any requirement which plaintiffs could disobey or violate or which is susceptible of enforcement by the United States or any one else. Hence, the order is not susceptible to the injunctive or restraining processes or decrees of this Court.

3. The relief prayed would, if granted, be vain, futile and ineffective in that annulment of the order by this court would not restore to the Commission's files the tariffs stricken therefrom by its order of February 5, 1935.

4. This Court is without power to grant effective relief in the premises for the reason that it has power under the statute which creates it only to annul, enjoin, suspend and set aside the order. Its power being thus limited to protection against unlawful orders, the Court is without power to issue the mandatory process which would be necessary to give plaintiffs effective relief.

[fol. 60] 5. Neither the plaintiffs' right, if any, to file the tariff with the Commission, nor the Commission's duty, if any, to accept and retain the tariff in its files, rests upon

the Commission's order of February 5, 1935, but upon the provisions of the Interstate Commerce Act itself. Hence, the order does not deprive plaintiffs of any legal right, nor does it affect any legal right of theirs.

6. Plaintiffs have a full, adequate and complete remedy at law.

7. The bill of complaint is without equity on its face, and the facts alleged therein are insufficient either to constitute a cause of action against the United States of America or to entitle plaintiffs to the relief prayed.

Wherefore, United States prays that the bill of complaint be dismissed and that an order be entered accordingly.

Second Defense

For its Second Defense to the bill of complaint United States answers and says:

I

United States admits for the purposes of this suit that the facts alleged in the opening paragraph and in paragraphs I and II of the bill are true, except that it denies that the order issued by the Interstate Commerce Commission February 5, 1935 "requires" the tariff therein referred to, to be stricken from its files, and alleges that said tariff was on that date by said order "stricken" from the files of the Commission.

II

United States admits that the facts alleged in paragraph III and the subparagraphs thereof, of the bill are substantially true and correct, but for a full and complete statement of the facts upon which the Commission acted in issuing its said order of February 5, 1935, the Court is respectfully referred to the full text of the Commission's report, annexed as Exhibit 1 to the bill, and to the contract mentioned in said paragraph III, annexed as Exhibit 3 to the bill; and United States further denies that said tariff mentioned in subparagraph (2) of paragraph III was filed

with the Commission in the manner provided by law, and alleges that the tariff was unlawful in the respects found by the Commission in its report.

[fol. 61]

III

United States admits that the facts alleged in subparagraphs (1) and (2) of paragraph IV of the bill are true, but denies that subparagraph (3) thereof contains a full, accurate or complete statement of the Commission's findings and conclusions, and for such full and complete statement of said findings and conclusions the Court is respectfully referred to the Commission's report, annexed as Exhibit 1 to the bill.

IV

United States denies the allegations contained in paragraph V and the several subparagraphs thereof, of the bill, and denies that the Commission's said order of February 5, 1935, is unlawful or void in any respect whatever for any of the reasons alleged in said paragraph V, or for any other reason, and further denies that plaintiffs will suffer irreparable injury or other legal damage if said order is not enjoined and annulled. Further answering subparagraph (7) of paragraph V, United States denies the allegation that shippers and consignees will be required to pay higher rates and will suffer irreparable injury if said order is not enjoined, and denies that plaintiffs have any standing to make such allegation in behalf of any shipper or any one else than plaintiffs themselves. Further answering said subparagraph (7), United States denies that plaintiffs are without an adequate remedy at law, and alleges that they have full, adequate and complete remedy at law in the premises.

V

Except as herein expressly admitted, United States denies each and every allegation of the bill of complaint, and of the several subdivisions thereof.

WHEREFORE, having fully answered the bill of complaint, United States prays that the relief therein prayed be denied and that said bill of complaint be dismissed with

costs to the plaintiffs, and that it have such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. Harold M. Stephens, Assistant Attorney General. J. Saxton Daniel, United States Attorney.

[fol. 62] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed April 5, 1933

To the Honorable the Judges of Said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, Sup. VI, title 28, Sec. 45a) we hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of ourselves, as its counsel, in the above-entitled suit.

(S.) Daniel W. Knowlton, Chief Counsel. (S.) E. M. Reidy, Assistant Chief Counsel.

[File endorsement omitted.]

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed April 5, 1935

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs' bill of complaint contained, for answer thereto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the opening paragraph, and paragraphs I and II, of the bill of complaint, the Commission admits for the purpose of this suit that the allegations therein contained are true.

II

Answering paragraph III of the bill of complaint, the Commission admits the allegations contained in subdivision (1) of said paragraph, except that the Commission [fol. 65] respectfully refers the court to its two reports therein referred to, Fort Benning Railroad Company Acquisition, 193 I. C. C. 223, 193 I. C. C. 517, for more full and complete information in the premises.

Answering subdivision (2), paragraph III of the bill of complaint, the Commission admits that plaintiffs filed with it the tariff therein referred to, as to the provisions of which the Commission respectfully refers the court to the tariff itself for more full and complete information in the premises.

III

Answering paragraphs IV to VI, inclusive, of the bill of complaint, the Commission admits and alleges that it made and entered a report and order dated February 5, 1935, referred to in paragraph IV of the bill of complaint and made a part thereof as Exhibit 1, in a proceeding then pending before it entitled Docket No. 26483, H. D. Pollard,

as Receiver of Central of Georgia Railway Company v. H. A. Page, Jr., C. F. Harris, Fort Benning Railroad Company et al.; that said proceeding was instituted by the Commission as a result of a complaint filed with it on May 1, 1934, by H. D. Pollard, as Receiver of the Central of Georgia Railway Company, referred to in paragraph IV of the bill of complaint and made a part thereof as Exhibit 4, to which complaint the Commission respectfully refers the Court for more full and complete information as to the contents thereof; that full hearings were had and thereafter the Commission made and entered and served upon all the parties in said proceeding the report of February 5, 1935, referred to in paragraph IV of the bill of complaint and made a part thereof as Exhibit 1, that following the service of the Commission's said report of February 5, 1935, the plaintiffs herein, filed a petition for reargument and reconsideration and for suspension or vacation of said report and order of February 5, 1935, which petition, by order dated March 4, 1935, was denied, and the Commission admits that true copies of said petition for reargument and reconsideration and its order of denial with respect [fol. 66] thereto are attached to and made a part of the bill of complaint as Exhibits 5 and 6, respectively, to which the Commission refers the Court for more full and complete information in the premises.

Further answering paragraphs IV to VI, inclusive, the Commission admits and alleges that in said proceeding the parties thereto, including the plaintiffs herein, were, and each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said report and order was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiffs herein by their counsel; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiffs in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceeding, including the plaintiffs herein, its said report

and order; that said report and order included the Commission's findings of fact, decision, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which said order is based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including matters covered by the allegations of the bill of complaint herein.

[fol. 67] The Commision further alleges that said order of February 5, 1935, was not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the bill of complaint.

Further answering paragraph V of the bill of complaint, the Commission denies that its said order of February 5, 1935, is invalid either for any of the reasons set forth in said paragraph or for any other reason.

Further answering paragraph V, subdivision (7) of the bill of complaint, the Commission denies that its said order of February 5, 1935, causes or will cause plaintiffs either irreparable damage or any damage if said order is not enjoined. In this connection the Commission alleges that the Roman numeral "IV" appearing on page 10 of the complaint should read "VI".

Except as herein expressly admitted, the Commission denies each of and all the allegations contained in the bill of Complaint, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order of February 5, 1935, which report and order is hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission, by Daniel W. Knowlton, E. M. Reidy.

[fol. 68] *Duly sworn to by Frank McManamy. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPEARANCE OF H. D. POLLARD, RECEIVER, AS DEFENDANT—Filed April 12, 1935

To the Honorable, the Judges of Said Court:

H. D. Pollard, as Receiver of the property and assets of Central of Georgia Railway Company, being a party in interest to the proceeding before the Interstate Commerce Commission, in which the order of said Commission was passed, which order is sought to be enjoined in the above stated Bill of Complaint, and being interested in sustaining the said order of the Commission, in the exercise of his rights conferred upon him under the provisions of Sections 212, 213, of the Judicial Code, as amended, hereby enters his appearance as a party-defendant in the above entitled cause.

This 12th day of April, 1935.

H. D. Pollard, as Receiver of the Property and Assets of Central of Georgia Railway Company, by T. M. Cunningham, His Solicitor.

[File endorsement omitted.]

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER MAKING H. D. POLLARD, RECEIVER, PARTY-DEFENDANT —Filed April 13, 1935

It appearing to the Court that H. D. Pollard, as Receiver of the properties and assets of Central of Georgia Railway Company, is interested in sustaining and upholding the order of the Interstate Commerce Commission, sought to be enjoined by the Plaintiff in the above stated cause; and it further appearing that the said H. D. Pollard, as Receiver as aforesaid, was the Complainant in the proceeding before the Interstate Commerce Commission, in which said order was passed, and that under the statutes of the United States he has the right to appear in said cause as a party thereto; and the said H. D. Pollard, as Receiver as aforesaid, having filed his appearance in said cause as a party-defendant, and having tendered his answer to the Bill of Complaint; it is thereupon ordered that the said H. D. Pollard, as Receiver of the properties and assets of Central of Georgia Railway Company, be and he is hereby made a party-Defendant to the above stated cause and the answer tendered by him is hereby allowed to be filed.

This 13th day of April, 1935.

(S) Wm. H. Barrett, United States Judge.

[File endorsement omitted.]

[fol. 71] [File endorsement omitted]

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER AND COUNTERCLAIM—Filed April 13, 1935

To the Honorable, the Judges of Said Court:

H. D. Pollard, as Receiver of the property and assets of Central of Georgia Railway Company, intervening De-

fendant in the above entitled suit, answering the Bill of Complaint, says:

1. Defendant admits the allegations of paragraph I of the Bill of Complaint.

2. Defendant admits the allegations of paragraph II of the Bill of Complaint.

[fol. 73] 3. Defendant admits the allegations of paragraph III of the Bill of Complaint, except the allegation that the tariff referred to in said paragraph of the Bill of Complaint was filed in the manner provided by law, and this allegation the Defendant denies.

4. Defendant admits the allegations of the sub-paragraphs numbered (1) and (2) of paragraph IV of the Bill of Complaint. Sub-paragraph (3) of paragraph IV of the Bill of Complaint quotes certain portions from the report of the Commission accompanying its order. The extracts from the report selected by the Plaintiffs are not fully explanatory of the order. The report speaks for itself and explains fully the grounds on which the Commission passed the order.

5. Defendant denies each and every allegation of sub-paragraphs (1), (2), (3) and (4) of paragraph V of the Bill of Complaint.

Answering sub-paragraph (5) of paragraph V of the Bill of Complaint, Defendant says: Paragraph 8 of the contract between Plaintiffs and Page and Harris, copy of which is Exhibit 3 attached to the Bill of Complaint, gives to Plaintiffs, subject to approval by the Secretary of War, the right to operate switching service with their own engines and crews over the tracks leased by Page and Harris between Fort Benning Junction, Georgia, and the designated receiving and delivery track at the Fort Benning Military Post. The Plaintiffs never have availed themselves of this provision of the contract and are not operating this switching service with their own engines and crews. [fol. 74] The approval of the Assistant Secretary of War of this provision of the contract was not in evidence when the Director of Service submitted his proposed report, although it purports to have been given on August 14, 1934, which was prior to the proposed report of the Director of

Service. This approval was first brought forward in the brief of the Plaintiffs on their exceptions to the proposed report of the Director of Service and was noticed by the Commission in its report accompanying the order here complained of. The Commission in its report disposed of this matter as follows:

"The Seaboard contends that by this endorsement the War Department has given approval to that Company to operate the Fort Benning line whenever it so desires. We do not so construe it. The endorsement was an approval of the terms of the contract, but granted no rights to the Seaboard to operate over the track in question. Manifestly, the War Department could take no action on a subject matter which the Congress has placed under our exclusive jurisdiction."

Defendant maintains that the Commission properly disposed of this matter.

Answering sub-paragraph (6) of paragraph V of the Bill of Complaint, Defendant says: It is true that the order of the Commission does not itself prescribe the date on which it shall become effective, but that fact does not render the order of the Commission null and void and of no effect. The order became effective immediately upon its issuance by the Commission. This order of the Commission was issued under and in pursuance of the provisions of Section 6 of the Interstate Commerce Act and no effective date is prescribed by law for an order of that [fol. 75] character. If paragraph 2 of Section 15 of the Interstate Commerce Act, which relates to the time when certain orders take effect, is applicable to this order, then this order became effective 30 days after its passage.

Answering sub-paragraph (7) of paragraph V of the Bill of Complaint, Defendant says: Defendant denies that if the tariff of the Plaintiffs is stricken that they will be deprived of any lawful rights, and denies that Plaintiffs will suffer thereby irreparable injury. The Plaintiffs will be deprived of an unconscionable advantage which they have maintained through the publication of an unlawful tariff. Defendants deny that the Courts should enjoin the order of the Commission in any manner. The facts stated in said sub-paragraph (7), except as herein specifically denied, are admitted.

Further answering the Bill of Complaint, Defendant says:

6. Fort Benning is a Military Reservation in Muscogee and Chattahoochee Counties, Georgia, embracing an area of approximately 98,000 acres. The inhabited portion of the Reservation is about ten miles from Columbus, Georgia. It is the seat of the Infantry and Tank Schools of the Army and has lately been used also in connection with the activities of the Civilian Conservation Corps. It has a normal population of between 7,500 and 8,000. The Seaboard Air Line Railway and the Central of Georgia Railway cross each other at a point known as Fort Benning Junction about 6.8 miles from the inhabited portion of the Military Reservation which is known as Fort Benning. Fort Benning Junction is about 4 miles southwest from Columbus, Georgia.

[fol. 76] About 15 years ago, the Federal Government built a line of railroad to connect Fort Benning Junction with Fort Benning proper. This railroad is owned by the Government and lies entirely on the Government Military Reservation. In addition to the main line, there are about 3 or 4 miles of spur tracks within the Reservation and certain equipment, shops and other facilities for the operation of the railroad.

There are no stations on the Fort Benning Line between the Junction and the Fort proper, and no passenger business is conducted over this line. The tonnage handled over this line aggregates about 2800 cars per year, mostly inbound. Under a program extending through 1940, a large amount of construction work is going on at the Fort. This line handles not only traffic for the Government which moves under Government bills of lading, but also handles all traffic shipped by contractors for use in the construction of the buildings at the Fort, which traffic is shipped on commercial bills of lading. Traffic is also handled over this line for anyone who desires to ship over it, including civilians, of whom there are a large number at the Fort. The Central of Georgia, the Seaboard and the Southern Railway compete with each other for the business to and from Fort Benning.

For several years following its completion, the Fort Benning line was operated under military auspices. At the request of the Government on June 15, 1924, the operation

of the main line was taken over by the Central of Georgia Railway Company under a license from the Secretary of War revocable at will. Under this arrangement the Cen- [fol. 77] tral handled all cars moving to and from Fort Benning and spotted cars at various points within the reservation, but the War Department continued to do the intra-terminal switching. With the concurrence of the War Department the Central established by duly published tariffs, rates from Fort Benning Junction to Fort Benning proper which were commonly known as arbitraries, and subsequently in return for a reduction in the arbitraries, it was agreed between the Central and the War Department that Fort Benning should be made a local station on the Central of Georgia in order that it might enjoy the long haul on all business.

7. September 2, 1932, upon recommendation of the Fort Benning Authorities, the Secretary of War revoked the license of the Central of Georgia Railway Company to operate the Fort Benning line, effective thirty days from the delivery of the notice, and since October 18, 1932, the main line and intra-terminal tracks have been operated by H. A. Page, Jr., and C. F. Harris under contracts with the Government hereinafter set forth.

The contracts between Page and Harris and the Government, under which Page and Harris operate the Fort Benning line, were the result of a plan which they entered into, the purpose of which was to profit themselves at the expense of the main line carriers. The proposal was made by Page and Harris to the Military Authorities at Fort Benning, and this was the scheme. The Government was to lease the Fort Benning line to Page and Harris, and Page and Harris were to do all the intra-terminal switching at the Fort for $1,000 per month and then Page and [fol. 78] Harris were to organize a corporation which was to apply to the Commission for a Certificate of Public Convenience and Necessity to operate the line from Fort Benning Junction to Fort Benning, and this corporation having acquired common carrier status would be enabled to share in a division of the through rates with the main line carriers up to Fort Benning Junction, and would use its best endeavors to have the rates made to Fort Benning the same as they were to Fort Benning Junction. In order to

make the scheme practical and workable, it was necessary to get the cooperation of one of the main line carriers. The Receivers of the Seaboard Air Line fell in with the plan, and Charles R. Capp, Chief Traffic Officer of the Receivers of the Seaboard, agreed with Page and Harris that when the Fort Benning line acquired common carrier status, the Seaboard would join with it in making the rates to Fort Benning proper the same as they were to Fort Benning Junction, and thus the War Department would be relieved from paying the arbitraries from the Junctoin to the Fort; and at the same time it was agreed that the Seaboard would concede to the Fort Benning line on coal a division of 50 cents out of the rate of 1.42 cents, and on refined petroleum products from Savannah ⅓ of the rate, and comparable divisions on other commodities. Pending the acquirement of common carrier status, the War Department was to pay Page and Harris $5.00 per car for their services for transporting the shipments from the Junction to the Fort, this in addition to the $1,000 per month paid for intra-terminal switching. When the Fort Benning line acquired common carrier status, the Government was to cease paying the [fol. 79] $5.00 per car for the transportation from the Junction to the Fort, and thereafter Page and Harris' compensation for this service would be the division they could get out of the main line carriers. In order to carry this plan into effect, Page and Harris entered into a contract with the Secretary of War dated October 18, 1932, to lease the Fort Benning Railroad properties, a copy of which is hereto attached, marked Exhibit "A", and hereby made a part of this Answer; and the said Page and Harris entered into a contract with the United States of America dated October 16, 1932, with reference to the operations of said railroad properties, a copy of which is hereto attached, marked Exhibit "B", and hereby made a part of this Answer.

8. Page and Harris, in accordance with the provisions of their contract with the Government, procured a charter under the laws of the State of Georgia for Fort Benning Railroad Company, and in the name of this Company an application was made to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity to operate the Fort Benning Line which had been leased as aforesaid from the Government, this application being

designated as "Finance Docket No. 9709." Central of Georgia Railway Company and H. D. Pollard, as Receiver thereof, appeared before the Commission in said proceeding and objected to the grant of the Certificate. The case came before Division No. 4 of the Commission, which consisted of Commissioners Meyer, Eastman, and Mahaffie. The three Commissioners assembled to hear the argument, but before the argument began Commissioner Eastman retired and did not hear the argument. Commissioners Meyer and Eastman joined in the Report to the effect that the [fol. 80] Certificate should be granted, and Commissioner Mahaffie dissented; and an order granting the Certificate was issued. The Central of Georgia Railway Company and H. D. Pollard, as Receiver thereof, petitioned the Commission for a rehearing on the ground, among others, that the two Commissioners who had heard the argument had disagreed and the Commissioner who did not hear the argument had controlled the decision of the question. The Commission granted the re-hearing and after re-argument, reversed the decision of Division No. 4 and rescinded the order granting the Certificate, and denied the application for the Certificate. This last stated order was dated October 4, 1933. The Fort Benning Railroad Company applied for a rehearing November 10, 1933, which was denied by the Commission December 11, 1933.

9. As explanatory of why the Receiver of the Central of Georgia Railway did not apply to the Commission for a suspension before it went into effect of the switching tariff of the Receivers of the Seaboard Air Line, a copy of which is attached to the petition as Exhibit "2", Defendant alleges as follows: Defendant did not learn of the issuance and filing of this tariff until a few days after it had gone into effect when he was informed for the first time of the tariff by Mr. Charles R. Capps, Chief Traffic Officer of the Receivers of the Seaboard Air Line Railway. Under the Articles of Association of the Southern Freight Association, of which both the Receivers of the Seaboard Air Line Railway and the Receiver of the Central of Georgia Railway are members, it is provided in the said Articles of Association that,

[fol. 81] Article VII. "(a). All proposals for changes in rates, rules and regulations made by member or other lines shall be addressed to the Chairman and copies in sufficient

number furnished for distribution to member lines. The Chairman may himself initiate proposals. Such proposals shall at once be distributed by the Chairman to member lines, shall bear the Association's submittal number, which numbers shall run consecutively, and shall carry notice that unless objections thereto are received within 15 days from the date of submittal, none shall be assumed held."

"Article VIII. "(a). Each member line through its Chief Traffic Officer reserves the right to take separate and independent action with respect to any rate, rule or regulation, considered by the General Committee or submitted by the Chairman in a mail proposal; or if any member line shall determine that any rate, rule or regulation it may believe necessary to establish is of such emergency character as to demand immediate disposition, it may give notice through the Chairman of intention to establish such rate, rule or regulation, provided: 1. That prior to the establishment of a change in any rate, rule or regulation, it is discussed in conference or by correspondence with the Chief Traffic Officer of the member lines whose revenues are affected. 2. That not less than ten days' notice shall be given before publication."

The Receivers of the Seaboard Air Line Railway did not comply with the above quoted Articles of the Southern Freight Association and, therefore, Complainant had no notice through that source.

On January 4, 1934, Page and Harris issued a circular, a copy of which is set forth in the copy of the complaint of the Receiver to the Commission attached to the Bill of Complaint as Exhibit "4". In this circular Page and Harris announced that the Government Railroad at Fort Benning Military Reservation is not a common carrier and that they were operating it entirely [fol. 82] as a private contractor, and that they would charge $12.50 per car (including the return of the empty) for all cars between the Junction and the Fort moving via Central of Georgia, and for less than carload lots under 10,000 pounds, 12½ cents for 100 pounds, with a minimum charge of 25 cents for any lot. The circular did not state what the charges of Page and Harris would be between Fort Benning Junction and the Fort on carload traffic moving via Seaboard Air Line Railway, but merely stated that as to

such traffic there would be a charge of $5.00 per car from the "Receiving and Delivery tracks" at the Fort to any spotting location. Under this circular shippers via Central of Georgia Railway Company whose traffic was destined to Fort Benning proper were required to and did pay $12.50 per car to Page and Harris for the transfer from the Junction to the Fort, except that Page and Harris sometimes departed from this charge, in order to avoid truck competition.

11. When the Defendant filed his complaint before the Interstate Commerce Commission on or about February 13, 1933, concerning the Seaboard Tariff (Docket No. 26483), against Plaintiffs and Page and Harris, he was not advised as to the arrangements between Page and Harris and the Plaintiffs, and hence in his complaint he prayed that the Commission would fully investigate the relations between the Receivers of the Seaboard, Page and Harris, and the War Department. The contract between Page and Harris and the Receivers of the Seaboard, a copy of which is attached to the bill of complaint as "Exhibit 3" and which discloses the relations between Page and Harris, [fol. 83] was not executed until June 7, 1933, which was a week before the hearing by the Director of Service of the complaint, which occurred June 14, 1933.

12. Shortly after the tariff of the Receivers of the Seaboard went into effect, the War Department advised the Receiver of the Central of Georgia Railway that the Receivers of the Seaboard were absorbing as to traffic moving via the Seaboard, the charges of Page and Harris on all Government freight moving between Fort Benning Junction and the Fort, and that unless the Receiver of the Central of Georgia Railway was prepared likewise to absorb the charges of Page and Harris on Government freight, that the War Department would not route any of its Fort Benning freight via the Central of Georgia Railway, and in consequence of this threat on the part of the War Department, and in order to participate in the hauling of the Fort Benning Government freight, the Receiver of the Central of Georgia Railway was compelled to pay to Page and Harris $12.50 on all Government freight moving in car load lots and one-half of its revenue if the revenue was less than $25.00. The War Department sought to apply this

arrangement also to traffic moving on commercial bills of lading consigned to the Government at Fort Benning, but on the insistence of the Receiver of the Central of Georgia Railway, that he could not lawfully absorb Page and Harris' charges on this class of traffic, the War Department finally conceded the contention of the Receiver of the Central of Georgia in this matter and the Central does not absorb any charges of Page and Harris on traffic moving on commercial bills of lading consigned to the Government, [fol. 84] but the Government pays Page and Harris $5.00 per car for handling such traffic. The Receiver of the Central can lawfully absorb Page and Harris' charges on strictly Government freight under the provisions of paragraph 1 of §22 of the Interstate Commerce Act which authorizes transportation for the Government at free or reduced rates.

13. The result of the application of the Tariff of the Receivers of the Seaboard and their arrangements with Page and Harris is that on all freight moving via the Seaboard and destined to or originating at Fort Benning the Receivers of the Seaboard absorb and pay to Page and Harris $12.50 per car, or one-half of their revenue if the revenue is less than $25.00, and shippers of such freight are relieved from paying such charges of Page and Harris; whereas on the other hand, shippers of traffic via the Central of Georgia destined to or originating at Fort Benning must pay to Page and Harris $12.50 per car. The effect of this is that on all commercial freight destined to or originating at Fort Benning that is competitive between the Seaboard and the Central, the shipper pays $12.50 less if his shipment moves via the Seaboard, than if his shipment moves via the Central, and the result is that substantially all such competitive freight moves via the Seaboard. The amount of freight so affected is very large and has been abnormally large ever since the Seaboard's tariff has been in effect, on account of the large amount of construction work in progress at Fort Benning.

14. The revenue which Page and Harris receive from the transportation of freight over the Fort Benning line goes [fol. 85] into their own pockets and is not accounted for by them to the Government. The provision of the contract between Page and Harris and the Government, whereby

Page and Harris were to be paid $5.00 per car by the War Department for all freight transported by them between Fort Benning Junction and the Fort, has been entirely departed from, except that the War Department pays Page and Harris $5.00 per car for traffic consigned to the Government on commercial bills of lading moving via Central of Georgia Railway, as hereinbefore stated.

15. The Fort Benning Railroad Company, in the name of which Page and Harris made the application for the Certificate of Public Convenience and Necessity in Finance Docket No. 9709, was chartered by them and controlled by them; it was never anything but a name; it was never organized, its stock was never issued, and when the Commission refused to issue the Certificate Page and Harris ceased to use its name in the operations of the Fort Benning line and thereafter operated the railroad in their own names.

16. As soon as the Commission refused to grant the Certificate, Page and Harris, the Receivers of the Seaboard, and the War Department cooperated and conspired to set at naught the decision of the Commission and to circumvent it. Although the contracts between Page and Harris and the Government have not been changed, the War Department has acquiesced and consented to the course pursued by Page and Harris and the Receivers of the Seaboard, with the end in view that although the Fort Benning line had [fol. 86] been denied common carrier status by the Commission, that it should, nevertheless, function in precisely the same way that a common carrier would function. Immediately after the Certificate was denied, the Receivers of the Seaboard filed their switching tariff and shortly thereafter agreed to deliver all Government freight at Fort Benning proper on the Fort Benning Junction rates. December 21, 1933, Page and Harris wrote a letter to the Quartermaster at Fort Benning that they proposed to charge shippers of commercial freight over the Fort Benning Railroad $12.50 per car. The Commandant at Fort Benning forwarded this announcement to the War Department and endorsed on it: "It is recommended that sympathetic consideration be given to the announced intention of the Fort Benning Railroad to make such a charge and to take such measures for relief as may be legal and just", and this recommendation was approved by the office of the Quartermaster General. January 3, 1934, Page and Harris issued their

Circular (Exhibit "C"), referred to in paragraph 10 of this Answer. January 11, 1934, Page and Harris forwarded to the War Department a proposed supplement to their lease, the substance of which was that Page and Harris were to be permitted to sublet and assign their lease to any or all of the common carriers operating in the vicinity of Fort Benning Junction, subject to the approval of the Commandant at Fort Benning. Notwithstanding the Commission had just decided that the Fort Benning line as operated by Page and Harris should not be granted a Certificate to function as a common carrier, Harry H. Woodring, Assistant Secretary of War, on the proposal of Page and Harris, made January 24, 1934, the following endorsement:

[fol. 87] "1. Since the result desired may be accomplished under the existing lease, there appears to be no necessity for the Secretary of War to delegate authority to the Commanding General, Fort Benning, which is the purpose of the proposed supplemental lease presented herewith. The War Department's primary concern is that adequate common carrier service be provided for Fort Benning under such terms as will be for the best interests of the Government. Accordingly,

"a. There is no objection to Page and Harris negotiating a common carrier service agreement with any or all trunk line railroads provided equally fair and identical terms are offered to all the common carriers, and that these agreements will not at any time exclude any other common carrier from rendering similar service.

"b. Since the details of any such agreement between Page and Harris and the railroads and the question of the amount of any consideration to be received by Page and Harris may be very material in determining whether approval should be given by the War Department, the agreement should be submitted to the Secretary of War for his approval in accordance with the terms of the existing lease."

The hearing of the Complainant of the Receiver of the Central of Georgia Railway against the tariff of the Receivers of the Seaboard was had before the Director of Service of the Commission June 14, 1934. June 8, 1934, Harry H. Woodring, Acting Secretary of War, wrote a letter to the Chairman of the Interstate Commerce Commission, in

which he stated: "From all available information, it is believed that the complaint of the Central of Georgia Railway Company is without merit, and that the evidence which will be produced at the hearing at Atlanta, Georgia, on June 14, 1934, will impel the conclusion that the present switching arrangements at Fort Benning should not be disturbed." The arrangements between Page and Harris and [fol. 88] the Receivers of the Seaboard, which were put into the form of a contract June 7, 1934, (Exhibit 3 to the Bill of Complaint) were actually made and acted on from the time Page and Harris issued their Circular of January 3, 1934, and were acquiescent in and encouraged by the War Department, although the War Department delayed formally approving the Contract of June 7, 1934, until August 14, 1934. So that ever since the decision of the Commission denying common carrier status to the Fort Benning line, Page and Harris and the Receivers of the Seaboard, with the active assistance of the War Department have been acting and doing just as though the Fort Benning line had the status of a common carrier. The switching tariff of the Receivers of the Seaboard is a mere device whereby Page and Harris are made an allowance of $12.50 per car out of the through rates to and from Fort Benning. The Receivers of the Seaboard are, therefore, through the medium of their switching tariff, putting Page and Harris in the position of a common carrier with reference to the Fort Benning line, when they have been denied that status by the Commission. For these reasons, the said tariff is contrary to paragraphs 18, 19 and 20 of Section 1 of the Interstate Commerce Act, and being so contrary to the Act, the order of the Commission is valid and legal on this ground, in addition to the grounds set forth by the Commission in its report accompanying said order.

17. The switching tariff of the Receivers of the Seaboard is unlawful and the order of the Commission, complained of in the Bill of Complaint, is legal and valid, not only for [fol. 89] the reasons stated by the Commission in its report accompanying said order, but for the following additional reason.

The Receivers of the Seaboard are operating over the Fort Benning line without a Certificate of Public Convenience and Necessity contrary to the provisions of Section 1, paragraphs 18, 19 and 20 of the Interstate Commerce Act;

and the Fort Benning line is not within the exceptions stated in paragraph 22 of Section 1 of the said Act. Under the provisions of paragraph 1 of Section 12 of the Interstate Commerce Act, the Commission is authorized and required to execute and enforce the provisions of the Act; and under paragraph 1 of Section 15 of the Interstate Commerce Act the Commission is authorized, whenever any practice of a common carrier subject to the Act is in violation of any provision of the Act, to make an order that the carrier shall cease and desist from such violation. The switching tariff of the Receivers of the Seaboard is unlawful if the Receivers have no lawful right to operate over the Fort Benning line. The Commission is invested with exclusive initial jurisdiction over the tariffs of common carriers subject to the Act, and, therefore, the Commission had power and jurisdiction to strike down the tariff on this ground, although it elected to put its decision on Section 6 of the Act.

18. It is wholly unnecessary for the Receiver of the Seaboard Air Line to absorb the charges of Page and Harris for the transportation of freight between Fort Benning and the Junction and if they have the legal right to absorb such charges the Receiver of the Central of Georgia would ulti- [fol. 90] mately in order to meet the competition be driven to do likewise. The payments made by the Receivers of the Seaboard to Page and Harris between December 4, 1933, (the date the Seaboard's switching tariff went into effect) and the middle of June 1934 (the date of the hearing of the Complaint of the Receiver of the Central) was $17,517.15. It is the spirit and purpose of the Interstate Commerce Act that the revenues of the carriers subject to the Act should be conserved and that their net earnings should not be impaired by any waste or preventable expense. This spirit and purpose is carried forward into the "Emergency Transportation Act 1933" (48 Stat. 211) and expressed as follows: "§4. The purposes of this Title are (1) to encourage and promote or require action on the part of the carriers and of subsidiaries subject to the Interstate Commerce Act, as amended, which will * * * (b) control allowances, accessorial services and the charges therefor, and other practices affecting service or operation, to the end that undue impairment of net earnings may be prevented, and (c) avoid other wastes and preventable expense."

The tariff of the Receivers of the Seaboard is contrary to the provisions of the Interstate Commerce Act in the particulars above stated and the order of the Commission complained of in the Bill of Complaint is valid and legal for this reason, in addition to the reasons set forth in the Report of the Commission accompanying said order.

19. The absorption by the Receivers of the Seaboard of the charges of Page and Harris for transportation between [fol. 91] Fort Benning Junction and the Fort is a rebate to the shippers of freight whose freight moves over the Seaboard Air Line destined to or originating at Fort Benning, and is contrary to Section 1 of the Act to Regulate Commerce, commonly known as the Elkins Act (U. S. Code, Title 49, Sec. 41), and for this reason the order of the Commission complained of in the Bill of Complaint is legal and valid.

20. The switching tariff of the Receivers of the Seaboard is unlawful and the order of the Commission complained of in the Bill of Complaint is legal and valid on the following additional grounds:

(1) The tariff does not comply with Section 6 (1) of the Interstate Commerce Act, in that it is obscure and difficult to interpret and may be given several different meanings.

(2) The Tariff does not state the absorptions or allowances to be made thereunder contrary to Section 6 (1) of the Interstate Commerce Act, and also contrary to Rule 10 (a) of the Freight Tariff and Classification Rules of the Commission, which provides: "Each carrier or its agent shall publish, post, and file tariffs which shall contain in clear, plain, and specific form and terms all the rules governing and rates and charges for demurrage, switching, * * * and other terminal services * * * absorptions, allowances, and all other charges and rules which in any way increase or decrease the * * * value of the service to the shipper, etc."

(3) The tariff is misleading in that it purports to be a [fol. 92] "Reciprocal Switching Tariff", whereas in point of fact, there is no reciprocity of any kind involved in the tariff.

Wherefore, this Defendant prays that the Bill of Complaint may be dismissed.

Counter-Claim

And this Defendant, H. D. Pollard, as Receiver of the properties and assets of Central of Georgia Railway Company, (hereinafter called "Receiver of Central Railway"), further answering the Bill of Complaint in the above stated cause, under and in accordance with the provisions of Equity Rule 30, presents this its counterclaim against the Plaintiffs in the above stated cause, Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company (hereinafter called "Receivers of Seaboard Railway"), and alleges as follows:

21. H. D. Pollard is the duly appointed and acting Receiver of the properties and assets of Central of Georgia Railway Company, by order dated December 19, 1932, issued in the Equity Cause of Alabama Fuel & Iron Company vs. Central of Georgia Railway Company, pending in the United States District Court for the Southern District of Georgia, and has been also appointed and continued as such Receiver under several other bills in equity, consolidated with the said equity cause above mentioned; and the said Receiver has been duly authorized to prosecute and defend any and all proceedings in any court or other tribunal, as he may be advised by Counsel.

[fol. 93] 22. Leigh R. Powell, Jr., and Henry W. Anderson are the duly appointed and acting Receivers of the properties and assets of Seaboard Air Line Railway Company, and are the Plaintiffs in the above stated Bill of Complaint.

23. Fort Benning Military Reservation comprises about 98,000 acres situate in Muscogee and Chattahoochee Counties, Georgia. It is the headquarters of the Infantry and Tank Schools of the Army, and is also used latterly in connection with the activities of the Civilian Conservation Corps. It has a normal population of 7,500 to 8,000. The lines of Railway of the Seaboard Air Line Railway Company and Central of Georgia Railway Company cross each other at a point known as Fort Benning Junction, which is about 4 miles southwest from Columbus, Georgia. The Southern Railway connects with the first two mentioned Railroads at Columbus, Georgia, and all three Railroads compete for traffic to and from Fort Benning.

About 15 years ago, the Government built a line of railroad (hereinafter described as the Fort Benning line), connecting with the Central of Georgia and Seaboard Air Line at Fort Benning Junction and running thence a distance of about 6.8 miles to the inhabited portion of Fort Benning, to a point known as the "Receiving and Delivery Tracks", at which point there is situated a freight depot, and from thence there radiate several switch or spur tracks to different parts of the inhabited portion of the Military Reservation. The Fort Benning line and the shops and other facilities connected with it are owned by the Govern- [fol. 94] ment and lie wholly on the Military Reservation. There are no stations on the line between the Junction and the Fort. No passengers are carried on this line. Freight is carried over this line for the Government, for contractors engaged in Government work, and for anyone living at the Fort, including civilians, of whom there are a large number. Much the larger part of the freight which moves over the Fort Benning line via either the Central of Georgia, Seaboard Air Line, or Southern Railway, is interstate freight.

24. The War Department operated the Fort Benning line for several years, until June 15, 1924, when the Central of Georgia Railway Company took over the operation of the line under a revocable license from the Government and continued to operate it under this license until it was revoked, effective October 18, 1932. When the Central of Georgia operated the Fort Benning line, the intra-Reservation switching was done by the War Department and not by the Central. When the Central of Georgia took over the operation of this line with the consent of the War Department, rates were made to Fort Benning proper, the rates being based on the rates to Fort Benning proper, plus rates from the Junction to the Fort, the latter rates being designated as arbitraries, and subsequently these arbitraries were reduced, in consideration of which the War Department in routing its freight treated Fort Benning as a station on the Central of Georgia Railway, so that the Central could keep competitive traffic on its own rails.

25. October 18, 1932, The Secretary of War leased to H. A. Page, Jr., and C. F. Harris the Fort Benning line

[fol. 95] and its appurtenances, a copy of the lease being hereto attached, marked Exhibit "A", and hereby made a part of this Answer. October 16, 1932, Page and Harris entered into a contract with the United States of America, acting through the Quartermaster's Department of the Army, which contract regulates the operations of the Fort Benning line and the intra-Reservation switching, a copy of the contract being hereto attached, marked Exhibit "B", and hereby made a part of this Answer. Page and Harris entered upon the operation of the Railroad under these contracts. Under this last-mentioned contract, Page and Harris do the intra-Reservation switching for the consideration of $1,000.00 per month paid them by the War Department. This contract further provides that Page and Harris were to organize a corporation to operate the Fort Benning Railroad, and that this Corporation should apply to the Commission for a Certificate of Public Convenience and Necessity to operate the Railroad, and until the Certificate was granted by the Commission the War Department would pay Page and Harris $5.00 per car for transporting freight from Fort Benning Junction to Fort Benning, this to be in addition to the $1,000.00 per month to be paid Page and Harris for the intra-Reservation switching. It was further stipulated that Page and Harris would use their best endeavors to have the rates made to and from Fort Benning the same level as they were to Fort Benning Junction, thus eliminating the arbitraries which the War Department had been paying. Messrs. Page and Harris arranged with the Receivers of the Seaboard through their Chief Traffic Officer, Mr. C. R. Capps, that the rates to Fort Benning should be made via the Seaboard the same level [fol. 96] they then were to Fort Benning Junction, and that Page and Harris should receive on shipments of coal to Fort Benning a division of 50 cents out of the revenue of $1.42 of the Seaboard up to Fort Benning Junction and should receive on refined petroleum products shipped from Savannah, Georgia, to Fort Benning, 33⅓% of the Seaboard's revenue, and that Page and Harris should receive comparable divisions on other commodities.

26. Page and Harris chartered the Fort Benning Railroad Company under the laws of Georgia, and in its name made application to the Interstate Commerce Commission

for a Certificate of Public Convenience and Necessity to operate the Fort Benning line and its appurtenances. The Receiver of the Central Railway opposed this application. The Certificate was first granted by Division No. 4 of the Commission (193 I. C. C. 223), and upon a rehearing before the full Commission the grant of the Certificate was rescinded and the application denied October 4, 1933 (193 I. C. C. 517). Page and Harris applied for a rehearing and this was denied December 11, 1933. The Fort Benning Railroad Company was never organized, nor was its stock issued, and after the Certificate was denied by the Commission, its name ceased to be used in connection with the operation of the Fort Benning line.

27. Shortly after the denial to Page and Harris of the Certificate, the Receivers of the Seaboard Railway filed with the Commission November 3, 1933, their so-called "Reciprocal Switching Tariff", effective December 4, 1933, a copy of which is attached to the Bill of Complaint as [fol. 97] Exhibit "2"; which tariff was ordered cancelled by the Commission, on the complaint of the Receiver of Central Railway, which order of the Commission is sought to be enjoined in the Bill of Complaint. This tariff purports to extend the switching limits of the Seaboard from Fort Benning Junction to the Receiving and Delivery Tracks at Fort Benning.

Shortly after this tariff went into effect, Page and Harris published their circular dated January 3, 1934, stating the rates which they proposed to charge on traffic moving between Fort Benning Junction and Fort Benning, a copy of which circular is contained in the copy of the Complaint of the Receiver of Central Railway to the Commission, which is attached to the Bill of Complaint as Exhibit "4". The contract between Page and Harris and the Receivers of Seaboard Railway dated June 7, 1934, which is attached to the Bill of Complaint as Exhibit "3", shows the arrangements which exist between Page and Harris and the Receivers of Seaboard Railway, with reference to the transportation of freight over the Fort Benning line. Under the Switching Tariff and this contract of June 7, 1934, the Receivers of Seaboard Railway pay to Page and Harris as to freight transported by the Seaboard, $12.50 per car for

all car load freight transported between Fort Benning Junction and the receiving and delivery tracks at Fort Benning and when the revenue of the Seaboard is less than $25.00, one-half thereof, and the shippers of freight are charged nothing for the haul between Fort Benning Junction and said receiving and delivery tracks. If, however, the shippers of such freight desire their freight spotted [fol. 98] in the Reservation, Page and Harris charge them an additional $5.00 per car for that service. In addition to all this, the Government pays Page and Harris $1,000 per month for the intra-Reservation switching at Fort Benning. Under the said contract of June 7, 1934, Page and Harris act as the agent of the Receivers of the Seaboard Railway in the transportation of Seaboard freight over the Fort Benning line, and under said contract the Receivers of the Seaboard Railway are given the right, subject to the approval of the Government, to use their own engine and cars to transport freight over the Fort Benning line between Fort Benning Junction and the Fort, when such freight comes from or goes to the Seaboard at Fort Benning Junction.

Shippers over the Central of Georgia Railway (except the Government on freight moving on Government Bills of Lading), pay to Page and Harris $12.50 per car for all carload freight which is transported over the Fort Benning line between Fort Benning Junction and the Fort, and thus shippers via the Seaboard Railway have an advantage of $12.50 per car over the shippers via Central of Georgia Railway. When the Central's revenue is less than $25.00, shippers over the Central pay Page and Harris one-half the Central's revenue. The amount of money which the Receivers of Seaboard Railway absorb and pay to Page and Harris for freight moving between Fort Benning Junction and the Fort is at the rate of approximately $35,000 per annum.

28. The operations over the tracks of the Fort Benning line between Fort Benning Junction and the receiving [fol. 99] and delivery tracks at Fort Benning are line haul services and not switching or terminal services.

29. The Receivers of Seaboard Railway, without having applied for or received a Certificate of Public Convenience and Necessity as required by Paragraphs 18, 19 and 20 of

Section 1 of the Interstate Commerce Act, through the device of their said switching tariff and their arrangements with Page and Harris hereinbefore described, are extending their line from Fort Benning Junction to the receiving and delivery tracks at Fort Benning, and this is a continuing act on their part; and the Receivers of Seaboard Railway are also through the device of said switching tariff and said arrangements with Page and Harris, operating over the Fort Benning line between Fort Benning Junction and the receiving and delivery tracks at Fort Benning; all of which is contrary to said Paragraphs 18, 19 and 20 of Section 1 of said Act.

30. The Interstate Commerce Commission on the complaint of the Receiver of Central Railway declared the said switching tariff of the Receivers of Seaboard Railway unlawful and invalid and ordered it cancelled February 5, 1935, a copy of which order and the report of the Commission accompanying it are attached to the Bill of Complaint as Exhibit "1". The Receivers of Seaboard Railway applied for a rehearing which was denied March 4, 1935.

31. The Receivers of Seaboard Railway have not obeyed the said order of the Interstate Commerce Commission, although it is of full force and effect, and are continuing [fol. 100] to absorb the charges of Page and Harris on all freight shipped via Seaboard Railway and moving between Fort Benning Junction and the receiving and delivery tracks at Fort Benning and are otherwise conforming to their practices and arrangements which were in effect prior to said order of the Commission, and which are hereinbefore set forth.

32. The Receiver of Central Railway is a party in interest in the matters and things covered by this counterclaim against the Receivers of Seaboard Railway and as such he is entitled under the provisions of paragraph 20 of Section 1 of the Interstate Commerce Act, to an injunction against the Receivers of Seaboard Railway to prevent them from extending their line of railroad from Fort Benning Junction to the receiving and delivery tracks at Fort Benning, and from operating the line of railroad between said points, without obtaining from the Commission a Certificate of Public Convenience and Necessity therefor

in conformity with the provisions of paragraphs 18, 19 and 20 of Section 1 of said Act.

33. The Receiver of Central Railway can have no relief against the matters and things set out in this counter-claim against the Receivers of Seaboard Railway except through the protection of a Court of Equity.

34. The Receiver of Central Railway competes with the Receivers of Seaboard Railway for traffic originating at or destined to Fort Benning, and said traffic is valuable and large in volume; and by reason of the unlawful extension by the Receivers of Seaboard Railway of their line of rail- [fol. 101] way to Fort Benning and of the operation by them of the line of railway between Fort Benning Junction and Fort Benning, as hereinbefore stated, the Receiver of Central Railway has suffered irreparable damage and will continue to suffer irreparable damage so long as said unlawful acts on the part of the Receivers of Seaboard Railway continue, and, therefore, the Receiver of Central Railway is entitled to a temporary injunction in the premises, until this matter can be heard and determined on final decree, or until the further order of the Court.

Wherefore, H. D. Pollard, as Receiver of the properties and assets of Central of Georgia Railway Company, being remediless under the rules of the common law, and waiving discovery, prays:

(1) That the Court will grant an injunction against Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, and against their agents and servants, and all other persons in active concert or participating with them, enjoining and restraining them and each of them, from extending the line of the Seaboard Air Line Railway from Fort Benning Junction to the receiving and delivery tracks at Fort Benning, and from operating the line of railway extending between said points, without obtaining from the Interstate Commerce Commission a Certificate of Public Convenience and Necessity as required under the provisions of paragraphs 18, 19 and 20, of Section 1 of the Interstate Commerce Act; and particularly enjoining and restraining said persons and each of them, (so long as the

Receivers of Seaboard Railway have no Certificate from [fol. 102] the Commission as aforesaid) from employing said Page and Harris, or any other persons or corporations to carry any freight over the Fort Benning line as agents or for or on behalf of the Receivers of the Seaboard Railway, or from charging or collecting from any person any freight for transportation between Fort Benning Junction and the receiving and delivery tracks at Fort Benning, or from absorbing such charges or paying them to Page and Harris or any other persons; and further enjoining and restraining said persons and each of them, from using said switching tariff of the Receivers of Seaboard Railway and from carrying out the contract of June 7, 1934, between Page and Harris and the said Receivers, as devices to accomplish the purposes of the said Receivers to extend the line of Seaboard Air Line Railway from Fort Benning Junction to Fort Benning, or to operate the lines of Railway between said points without a Certificate from the Commission as aforesaid; and further enjoining and restraining said persons and each of them from employing any other devices or means whatsoever to accomplish said purposes, without the Certificate of the Commission as aforesaid.

(2) That the Court will issue a rule to the said Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, to show cause, if any they have, why a temporary injunction should not issue to remain in effect until the final decree, or until otherwise ordered by the Court, against them, their agents and servants and all persons who may aid or abet them, restraining and enjoining them, [fol. 103] and each of them, in the manner and form as set forth in the paragraph 1, next above; and that a temporary injunction shall issue accordingly.

(3) That the Receiver of Central Railway may have such other and further relief as may be meet and proper and that he have general relief touching the matters and things set forth in the counter-claim.

(4) That the said Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers as aforesaid, may be required to plead or answer to this counter-claim brought against them.

by H. D. Pollard, as Receiver of the properties and assets of Central of Georgia Railway Company.

T. M. Cunningham, Solicitor for H. D. Pollard, Receiver of the Property and Assets of Central of Georgia Railway Company.

[fol. 104] *Duly sworn to by H. D. Pollard. Jurat omitted in printing.*

[fol. 105] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STRIKE COUNTER-CLAIM OF INTERVENOR H. D. POLLARD, AS RECEIVER OF THE PROPERTIES AND ASSETS OF CENTRAL OF GEORGIA RAILWAY COMPANY Filed April 22, 1935.

Comes now the Plaintiffs, by their undersigned solicitors, and move to strike the purported counter-claim of the Intervenor, H. D. Pollard, as Receiver of the properties and assets of Central of Georgia Railway Company, attached to and filed with and in the answer of said Intervenor to the Bill of Complaint, said purported counter-claim being more particularly referred to as follows:

Beginning with the caption "Counter-Claim" on page 16 of the document, which is entitled on the cover "Answer of H. D. Pollard, Receiver of the properties and assets of Central of Georgia Railway Company", filed in this cause, and continuing through paragraph numbered 21 on said page 16 to paragraph numbered 24 on page 22, both inclusive; and also prayers numbered (1) to (4), inclusive, beginning at the bottom of page 22 and ending on page 24.

And as grounds for the foregoing motion, the Plaintiffs assign the following:

1. The Bill of Complaint herein, challenging the legality of an order of the Interstate Commerce Commission, presents for the Court's determination a single issue only, i. e. whether the said Commission has the power to strike the Plaintiffs' tariff from its files for the reason stated in the report and order herein complained of. The counter-claim of the intervening Defendant seeks to litigate in this proceeding the right of the Plaintiffs to provide the service

covered by said tariff without obtaining from said Commission a certificate of public convenience and necessity pursuant to Section 1(18) of the Interstate Commerce Act. The issue raised by the Bill of Complaint may and should be decided by the Court without reference to the subject matter of the counter-claim, which therefore attempts to assert an independent cause of action neither related nor [fol. 106] germane to the issue of the Bill of Complaint. As such it is not a counter-claim properly pleadable within the permissible limits of Equity Rule 30.

2. As set forth in the Bill of Complaint herein, Plaintiffs are the duly qualified Receivers of the properties and assets of Seaboard Air Line Railway Company appointed by orders of the District Court of the United States for the Eastern District of Virginia and by orders of the District Court of the United States for the Southern District of Florida in the Ancillary Receivership Proceedings therein instituted and still pending. By virtue of these proceedings possession of the properties and assets of which Plaintiffs are Receivers has been taken and is now held by said Courts, to the exclusion of all other courts. The said counter-claim seeks affirmative relief which, if granted, will, in effect, directly affect and interfere with the possession, operation and control of the properties of Seaboard Air Line Railway Company, in conflict with and in derogation of the exclusive jurisdiction of the Receivership Courts, and in particular the possessary and exclusive jurisdiction of these Receivers, and the said properties of Seaboard Air Line Railway Company, held and exercised by the District Court of the United States for the Southern District of Florida. Said counter-claim and the relief therein prayed are therefore beyond the jurisdiction of this Court. The said counter-claim seeks to assert a jurisdiction in this Court over the Plaintiffs in conflict with the exclusive jurisdiction of the said District Court of the United States for the Southern District of Florida.

3. The jurisdiction of this Court over the subject matter of the Plaintiffs' Bill of Complaint arises solely by reason of Section 43 of Title 28, U. S. C. A. (38 St. L., 219), which provides as follows:

"*Venue of suits relating to orders of Interstate Commerce Commission.*—The venue of any suit brought to en-

force, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment."

[fol. 107] To construe said Section 43 as giving to this Court jurisdiction to entertain a counter-claim against these Plaintiffs, as Receivers, would be in conflict with the provisions of Section 56 of the Federal Judicial Code (36 St. L., 1102, U. S. C. A. Title 28, Section 117), which provides as follows:

"*Property in different States in same circuit; jurisdiction of receiver.*—Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within the different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals, for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie, or be, within ten days thereafter, of a duly certified copy of the bill and order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within

ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be."

4. If Intervenor Pollard, as Receiver has any lawful right to assert as against Plaintiffs, as Receivers of the properties and assets of Seaboard Air Line Railway Company, the alleged right to enjoin or restrain them in respect of the matter set forth in the said counter claim such right can be asserted only in the Court appointing the Plaintiffs Receivers and having jurisdiction and control of said Receivers and their actions, and of the properties of Seaboard Air Line Railway Company within the Fifth Judicial Circuit, viz: the District Court of the United States for the Southern District of Florida.

5. The only appropriate method by which Intervenor Pollard, as Receiver can assert his alleged right to prevent or restrain the Plaintiffs in respect of the matters set up in the counter-claim, is by intervening petition filed in the Seaboard Air Line Railway Company Receivership Proceedings pending in the District Court of the United States for the Southern District of Florida, on application to said Court for leave to intervene.

[fol. 108] 6. The sole issue cognizable by this Court in this proceeding is the validity of the order of the Interstate Commerce Commission, which the Bill of Complaint seeks to enjoin. The jurisdiction of this Court as a specially assembled statutory court to hear and determine the issues presented upon the Bill of Complaint of Plaintiffs herein is conferred by Section 47 of Title 28, U. S. C. A. (28 St. L., 220), and is limited to the purposes and issues referred to and contemplated by said section, which provides as follows:

"*Interlocutory injunctions as to orders of Inter-state Commerce Commission; appeal to Supreme Court.*—No

interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: In cases where irreparable damage would otherwise ensue to the petitioner a majority of said three judges concurring may on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage will result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case if such appeal be taken within thirty days after the order, in respect to

which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

[fol. 109] 7. By filing their Bill of Complaint in the District Court of the United States for the Southern District of Georgia, the Plaintiffs did not confer upon said Court or upon the statutory court of three judges assembled to try the issues presented by the Bill of Complaint, jurisdiction to entertain such a counter claim as Intervenor seeks to interpose.

8. The subject matter of the counter claim and Intervenor's alleged right to relief upon which said counter claim are based do not arise out of the transaction which is the subject matter of Plaintiff's suit and are not such that this Court would have jurisdiction of the Receivers of the properties of Seaboard Air Line Railway Company in an independent suit in equity brought by Intervenor, as Plaintiff against the Receivers of the properties of Seaboard Air Line Railway Company, as Defendants.

9. This Court has no jurisdiction to entertain the counter-claim of Intervenor since it does not arise out of the transaction which is the subject matter of Plaintiffs' suit and since the Court would have no jurisdiction to entertain the subject matter of said counter claim if presented in an independent suit in equity brought by Intervenor, as Plaintiff, against the Receivers of the properties of Seaboard Air Line Railway Company, as Defendants.

Wherefore, Plaintiffs pray the Court to order said counter-claim stricken, saving and reserving to themselves the right to reply thereto in the event this motion is not sustained.

S/ Chas. T. Abeles, J. Randolph Anderson, Solicitors for Plaintiffs.

File endorsement omitted.

[fol. 110] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFFS' REPLY TO COUNTER CLAIM OF H. D. POLLARD, AS RECEIVER OF THE PROPERTY AND ASSETS OF CENTRAL OF GEORGIA RAILWAY COMPANY, INTERVENING DEFENDANT—Filed April 29, 1935

Come now the plaintiffs and, expressly denying the jurisdiction of this Court in this proceeding to entertain, consider or adjudicate against plaintiffs upon or in respect of the subject matter of the purported counter claim of the Receiver of Central of Georgia Railway Company (hereinafter called Receiver of the Central) and, subject to and without derogation of the motion hereinbefore filed by plaintiffs to strike the said counter claim, for reply thereto say:

1. The plaintiffs admit the allegations of Section 21 of said counter claim.

2. The plaintiffs admit the allegations of Section 22 of said counter claim.

3. The plaintiffs admit that the description of the Fort Benning military reservation set forth in the first paragraph of Section 23 is substantially correct. The plaintiffs admit, as alleged in the second paragraph of said Section 23, that the Federal Government constructed a track extending from Fort Benning Junction to the Fort Benning Military Reservation, but deny that said track is a line of railroad and aver it to be merely an industrial spur or switching track. The plaintiffs further deny that any substantial amount of traffic is transported over said track for [fol. 111] parties other than the Government and the contractors engaged within said military reservation on construction work for the Government.

4. The plaintiffs admit on information and belief that, as alleged in Section 24 of said counter claim the War Department operated said track until 1924 and the Central of Georgia Railway thereafter until 1932. The plaintiffs are without knowledge as to the remaining allegations of said Section 24 and neither admit nor deny the same.

Plaintiffs allege, however, that the allegations of said Section 24 are wholly irrelevant and immaterial to any proper issue in this proceeding, and should therefore be disregarded.

5. The plaintiffs are without knowledge of the negotiations between the Secretary of War and Page & Harris and the operations of the track by said Page & Harris, all as set forth in Section 25 of said Counter claim. Plaintiffs deny the allegation of said Section 25 that the Receivers of the Seaboard arranged with said Page and Harris that the rates to Fort Benning via Seaboard should be made the same as the then existing rates to Fort Benning Junction.

Plaintiffs allege, however, that the allegations of said Section 25 are wholly immaterial and irrelevant to any proper issue in this proceeding, and should therefore be disregarded.

6. The plaintiffs admit the allegations of Section 26 of said Counter Claim, except that they are without knowledge as to the organization of the Fort Benning Railroad Company.

Plaintiffs further aver that the allegations of said Section 26 are wholly irrelevant and immaterial to any proper issue in this proceeding, and should therefore be disregarded.

7. The plaintiffs admit the filing of the tariff attached to the bill of complaint as Exhibit 2, as alleged in the first paragraph of Section 27 of said counter claim, but, denying that said tariff was ordered cancelled by the Commission, aver that the Commission by its order, but without any lawful authority so to do, directed the said tariff to be stricken from its files, but expressly refrained from attempting to order or direct that said tariff be cancelled. The plaintiffs further expressly aver that said order of said Commission in so directing the tariff to be stricken is not tantamount to a cancellation of said tariff even if power to cancel rests with the Commission, which plaintiffs expressly deny.

[fol. 112] Plaintiffs admit, as alleged in the second paragraph of said Section 27, that Page & Harris issued the circular therein described, and that the contract filed as Exhibit 3 to the bill of complaint herein sets forth the arrangement between plaintiffs and Page & Harris for the

transportation of freight between Fort Benning Junction and the military reservation, but refer to said contract for the terms and conditions of operation of the Fort Benning tract by Page & Harris as agents of plaintiffs. Plaintiffs admit that said contract grants plaintiffs the right, subject to the approval of the Government, to operate said tract with their own engines and crews whenever they so desire, and aver that said approval has been unconditionally given. Plaintiffs admit, on information and belief, the allegations of said paragraph in respect of the charges made by Page & Harris for spotting cars within the military reservation and the payment received by them from the Government for intra-reservation switching, but deny, if it be the intent of said paragraph to allege, that said charges and payment are pursuant to the provisions of said contract; and plaintiffs aver that the allegations respecting said charges by and payment to Page & Harris for spotting and intra-reservation switching are wholly irrelevant and immaterial to any proper issue in this proceeding, and should therefore be disregarded.

8. Plaintiffs admit, on information and belief, the allegations of the third paragraph of said Section 27 with respect to payments to Page & Harris by shippers over the Central of Georgia Railway, but aver that Page & Harris have been and now are ready and willing to enter into the same arrangement with the Receiver of the Central of Georgia for the transportation of traffic moving via his lines as said Page & Harris now have with the plaintiffs; and that if shippers via the line of the Receiver of the Central are required to pay higher transportation charges for freight transported over the Fort Benning line between Fort Benning Junction and the Military reservation than are shippers via the plaintiffs' lines, the refusal of the Receiver of the Central to enter into such arrangements with Page & Harris is solely responsible therefor.

Plaintiffs admit that the amount of the payments made by plaintiffs to Page & Harris for their services as agents of plaintiffs in operating the Fort Benning track as set forth in said paragraph 8 is substantially correct, but aver [fol. 113] that the payments so made are less than the costs to which the plaintiffs would be subjected if they operated said track with their own engines and crews.

Plaintiffs further aver that the allegations of said third paragraph of Section 27 are wholly irrelevant and immaterial to any proper issue in this proceeding, and should therefore be disregarded.

9. The plaintiffs deny the allegations of Section 28 of said counter claim.

10. The plaintiffs deny that they are extending their line in the manner alleged in Section 29 of said counter claim, and further deny that they are doing any other act or thing contrary to paragraph (18), (19) and (20) of Section 1 of the Interstate Commerce Act, or any other provision of law.

11. The plaintiffs admit that the Interstate Commerce Commission declared the plaintiffs' switching tariff unlawful, as alleged in Section 30 of said counter claim, but, as is more fully set forth in paragraph 7 of this reply to said counter claim, deny the averment that said Commission ordered said tariff to be cancelled.

Plaintiffs further aver that the order of said Commission referred to in said Section 30 of said counter claim is beyond the power and authority of said Commission and is therefore null and void.

12. Replying to Section 31 of said counter claim, plaintiffs admit that they are now operating the Fort Benning track under the contract with Page & Harris attached as Exhibit 3 to the bill of complaint herein, but deny that in so doing they are violating any provision of law or any lawful order of the Interstate Commerce Commission; and plaintiffs further deny, for the reason set forth in sub-paragraph (6) of Section V of the bill of complaint herein, that the order of said Commission referred to in Section 31 of said counter claim is in full force and effect.

13. The plaintiffs deny that the Receiver of the Central is entitled to an injunction, as alleged in Section 32 of said counter claim, or to any other form of equitable relief from this court.

14. The plaintiffs deny the allegations of Section 33 of said counter claim and deny that the Receiver of Central is

entitled to injunctive or any other relief upon said counter claim.

[fol. 114] 15. Plaintiffs admit that the Receiver of the Central competes with them for traffic originating at or destined to Fort Benning, as alleged in Section 34 of said counter claim, but deny that plaintiffs have unlawfully extended their line of railway to Fort Benning or that the Receiver of the Central has suffered or will suffer damage by any unlawful extension as alleged or by any other act of plaintiffs of an unlawful character. Plaintiffs further deny that the Receiver of the Central is entitled to any injunction either temporary or permanent against plaintiffs or to any other equitable relief whatsoever.

16. Except as herein expressly admitted plaintiffs deny each of the allegations contained in said counter claim, insofar as they conflict either with the allegations of this reply or with the statements of fact or conclusions set forth in the bill of complaint filed herein.

17. Further Replying, plaintiffs say that the tariff filed with the Interstate Commerce Commission and the services rendered thereunder are in contemplation of law a switching service and within the preview of paragraph (22) of Section 1 of the Interstate Commerce Act, and not an extension of its line or the operation thereof within the meaning of paragraph (18) of said Section 1, and that as such the plaintiffs are not required by law to obtain a certificate of public convenience and necessity for such operation.

Wherefore, plaintiffs pray that said counter claim be dismissed.

(S.) W. R. C. Cocke, Chas. T. Abeles, J. Randolph Anderson, Solicitors for Plaintiffs.

[File endorsement omitted.]

[fol. 115] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA.

In Equity. No. 325

LEGH R. POWELL, JR., and HENRY W. ANDERSON, as Receivers of Seaboard Air Line Railway Company, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA et al., Defendants

Statement of the Evidence and Proceedings Before the Court—Filed July 7, 1936

STIPULATION AS TO HEARING, ETC.

On the hearing of the above entitled Cause on the 29th day of April, 1935, the following proceedings not otherwise appearing of record were held:

1. It was stipulated that this hearing should be both interlocutory and final, and that the Court should render a final decree in the case.

2. The motion of the Plaintiffs to strike the counter-claim of the Defendant, H. D. Pollard, as Receiver of Central of Georgia Railway Company, was first presented to the Court and, after some colloquy on the subject, it was decided that the Plaintiffs might present their answer to the counter-claim without prejudice to the motion to strike and that the Court would consider and decide the motion, the main case and the counter-claim together.

3. It was agreed that the evidence introduced before the Court would be applicable to the counter-claim as well as to the main case.

ADMISSIONS AS TO CERTAIN FACTS

4. It was admitted on the trial of the case that the Receivers of Seaboard Air Line Railway Company had not received a Certificate of Public Convenience and Necessity to operate the Fort Benning Line.

[fol. 116] 5. It was admitted on the trial of the case that after the order of the Interstate Commerce Commission in

Docket 26483 was entered the Receivers of the Seaboard Air Line continued their arrangement with Page and Harris, whereby Page and Harris operated the track between Fort Benning Junction and Fort Benning as agents of the Receivers, and compensated Page and Harris for their services.

OFFER IN EVIDENCE

6. The Plaintiffs introduced in evidence a duly certified copy of all the record, evidence and exhibits before the Interstate Commerce Commission, in the complaint of H. D. Pollard, as Receiver of Central of Georgia Railway Company, against H. A. Page, Jr., C. F. Harris, Fort Benning Railroad Company and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, known as Docket No. 26483; the material portions of which are as follows:

Record in Docket No. 26483

It is stipulated that the only parts of the record in Docket No. 26483 material to the consideration of this case are (a) the complaint, (b) the report of the Commission, (c) the order of the Commission dated February 5, 1935, issued on its report, (d) the petition for reargument and reconsideration, etc., (e) the order of the Commission denying the petition for reargument and reconsideration. These five documents are all attached as Exhibits to the Bill of Complaint in this cause, and being admitted to be correct copies, it is unnecessary to reproduce them here. (f) Motion of the Receivers of the Seaboard Air Line to dismiss complaint for want of jurisdiction, (g) motion on special appearance of Defendants H. A. Page, Jr., and C. F. Harris to dismiss the complaint, (h) order of Commission of June 4, 1934, denying motions to dismiss of Receivers of Seaboard Air Line and of Page and Harris. These last three mentioned portions of the record in Docket No. 26483 are here copied as follows:

[fol. 117] (f) MOTION OF THE RECEIVERS OF THE SEABOARD AIR LINE TO DISMISS COMPLAINT FOR WANT OF JURISDICTION

Come now the defendants, L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, appearing herein specially for the purpose of interposing this motion to dismiss the complaint in this proceeding for want of jurisdiction in the Interstate Commerce Commission to entertain, hear or decide the same, or to grant the relief prayed for, and, reserving the right to object to the jurisdiction of this Commission in any other form or manner and on any other ground not herein specifically set forth, move that the Commission decline to take jurisdiction of said petition and dismiss the same. As ground for their motion these defendants respectfully show:

1. The complaint shows upon its face that it seeks to submit to this Commission a subject matter over which it has no express or implied authority and it therefore affirmatively appears that this Commission has no power or jurisdiction to entertain or decide said complaint.

2. The complaint seeks relief which this Commission is without power or authority to grant.

3. No basis is shown in said complaint for any jurisdiction in the Commision to issue any order or grant any relief against these defendants or against defendants Page and Harris under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act, as amended.

4. Stripped of extraneous, irrelevant, confusing and contradictory averments it affirmatively appears from the allegations of the petition that the gravamen of the complaint is the alleged operation of the so-called "Fort Benning Line" in violation of paragraph (18) of Section 1 of the Interstate Commerce Act, as amended. Without conceding, but on the contrary specifically denying, that the service over the so-called "Fort Benning Line" constitutes [fol. 118] an operation in violation of said paragraph (18) of Section 1, these defendants assert that paragraph (20) of Section 1 of said Act provides the remedy for, and pro-

cedure for the enforcement of violations of said paragraph (18) of Section 1, that the remedy and procedure there prescribed exclude any and all other proceedings, administrative and judicial, which seek to prevent, restrain or punish violations of said paragraph (18), and that this Commission is therefore without power or authority to entertain or decide the complaint herein (Texas & Pacific R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 266).

5. It affirmatively appears from the averments of the complaint that the charge therein of violation of paragraph (18) of Section 1 of the Interstate Commerce Act is not made against these defendant Receivers, but against Page and Harris, but it is not made to appear that Page and Harris are operating as a common carrier, or are otherwise subject to the jurisdiction of this Commission under said paragraph (18) of Section 1, or under any other valid provision of law.

6. The complaint prays that a tariff issued by these defendants be declared unlawful and null and void by the Commission, and that these defendants be required to cancel said tariff, on the ground that it is "obscure and difficult to interpret" and therefore in violation of paragraph (1) of Section 6 of the Interstate Commerce Act. These defendants assert that said tariff shows on its face, and this Commission will take cognizance of the fact, that said tariff complies in every essential respect with the requirements of said paragraph (1) of Section 6, and affords no colorable basis or justification for the complaint herein.

7. The right or interest of the petitioner to complain of the alleged obscurity of the tariff is not averred or shown, but on the contrary it affirmatively appears from said complaint that no such right or interest in petitioner exists.

[fol. 119] 8. The complaint prays that said tariff be declared unlawful, null and void on the further ground that it is in violation of this Commission's order in Finance Docket No. 9709, and seeks to extend the operation of these defendants over the so-called "Fort Benning Line" without obtaining from this Commission a certificate of public convenience and necessity. Said prayer in effect seeks from this Commission relief from an alleged violation of paragraph (18) of Section 1 of the Interstate Com-

merce Act, as amended, which, as hereinbefore set out, this Commission is without power or authority to grant.

9. The complaint further prays that the arrangements between these defendants and Page and Harris be adjudged by this Commission to constitute an evasion of the Commission's order in Finance Docket 9709. The Commission will take judicial cognizance of the fact that these defendants were not applicants in, or formal parties to, the proceedings in said Finance Docket, and were not and could not be affected by the order therein. Moreover, said prayer again, though in different form, seeks relief from an alleged violation of paragraph (18) of Section 1 of the Interstate Commerce Act, as amended, a subject matter over which this Commission is without power or jurisdiction in this proceeding.

10. The complaint further prays that this Commission investigate the relations between these defendants and Page and Harris with reference to the so-called "Fort Benning Railroad". It appearing affirmatively from the complaint that the sole purpose of such investigation would be to ascertain whether the said Fort Benning Railroad" was operated without a certificate of public convenience and necessity from this Commission in violation of paragraph (18) of Section 1 of the Interstate Commerce Act, and, as heretofore stated, the form and procedure for the determination of such fact being specifically and exclusively prescribed by paragraph (20) of said Section 1 of the Interstate Commerce Act, and there being no other substantial basis for the complaint, no reasonable ground for the investigation prayed for appears and this Com-[fol. 120] mission has no power or jurisdiction to hear or decide said complaint.

Wherefore, these defendants pray that the Commission decline to take jurisdiction of the complaint herein and that the same be dismissed.*

Dated May 10, 1934.

(Subscriptions of Counsel and Certificate of Service omitted.)

* * * * * * *

* Oral argument on the foregoing petition is hereby requested.

(g) Motion on Special Appearance of Defendants H. A. Page, Jr., and C. F. Harris to Dismiss the Complaint

Come now the defendants, H. A. Page, Jr., and C. F. Harris, and enter their appearance specially, solely for the purpose of moving to dismiss the complaint in this proceeding for lack of jurisdiction, and move that the Commission dismiss said petition as to them, and as grounds for their motion they respectfully show:

1. As appears on the face of the complaint in Paragraph 6, the Interstate Commerce Commission, in Finance Docket 9709, 193 I. C. C. 517, denied a certificate of convenience and necessity to the Fort Benning Railroad Company. Promptly following that denial, said company's corporate charter was abandoned and the Fort Benning Railroad Company never functioned as an operating entity.

2. As appears on the face of the complaint, in Paragraph 10, Page & Harris operate the Government's railroad which lies entirely upon property of the United States Government, in a private capacity, and do not hold themselves out to act as common carriers or to serve the public generally.

3. On its face the complaint does not comply with the rules of practice of the Interstate Commerce Commission [fol. 121] which require to be set out the specific acts or sections of acts to regulate interstate commerce, which have been or alleged to be or to have been violated by any acts or omissions of Page & Harris, and no basis is shown in said complaint for any jurisdiction in the Commission over the defunct Fort Benning Railroad Company or these defendants, Page & Harris.

4. On its face if the inference might be drawn that the complaint purports to charge that the operation of the Government's Fort Benning Railroad under contract constitutes an operation in violation of said Section 1 (18), these defendants assert that the remedy and procedure for the enforcement of any alleged violations of said Section 1 (18) are contained in Section 1 (20) of the Interstate Commerce Act as amended, and that the remedy and procedure there prescribed to prevent, restrain or punish violations of said Section 1 (18) exclude any and all other proceed-

ings, administrative or judicial, hence this Commission would be without power or authority to entertain or decide the complaint herein (Texas & Pacific R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 266).

5. Prayer No. 1 of the complaint prays that a certain tariff issued by L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, be ordered cancelled cannot be directed against these defendants, who are not parties to said tariff.

6. Prayer No. 2 of the complaint prays that the Commission find and adjudge that these defendants, Page & Harris, are operating the "Fort Benning line" contrary to the Commission's denial of the application of Fort Benning Railroad Company in Finance Docket No. 9709 for a certificate of public convenience and necessity; and that the Commission order these defendants, Page & Harris, to cease and desist therefrom is in effect a prayer to enjoin an alleged violation of Section 1 (18) of the Interstate Commerce Act as amended, which, as hereinbefore set out [fol. 122] in Paragraph 4, this Commission, even if such a violation existed, which is denied, is without power or authority to grant.

7. Prayer No. 3 of the complaint prays that the Commission find and adjudge that the arrangements by the Receivers of the Seaboard Air Line Railway and these defendants constitute a scheme or device to evade and set at naught the Commission's denial of the application of Fort Benning Railroad Company in Finance Docket No. 9709 for a certificate of public convenience and necessity, and that said defendants be ordered to cease and desist therefrom, is also in effect a prayer to enjoin an alleged violation of Section 1 (18) of the Interstate Commerce Act as amended, which this Commission, even if such a violation existed, which is denied, is without power or authority to grant.

8. Prayer No. 4 of the complaint vaguely prays that this Commission investigate the relations between these defendants, Page & Harris, and the War Department with reference to the operation of the Fort Benning Railroad when it has no jurisdiction over either, and also the ar-

rangement between these defendants and the Receivers of the Seaboard Air Line Railway with reference to the said Fort Benning Railroad. Obviously the Commission has no power or jurisdiction to investigate the rendition of service to the War Department by these defendants in their private capacity, and not as common carriers, of the Government owned railroad serving exclusively the Military Post at Fort Benning. Nor is any reference made to any act or section of an act under which this Commission has any jurisdiction over these defendants, Page & Harris, in their private capacity in relation to the Receivers of the Seaboard Air Line Railway.

Wherefore these defendants pray that the Commission decline to take jurisdiction of the complaint herein and that the same may be dismissed.

Dated at Washington, D. C., this eleventh day of May, 1934.

(Subscriptions of Counsel and Certificate of Service omitted.)

* * * * * * *

[fol. 123] (h) ORDER OF COMMISSION OF JUNE 4, 1934, DENYING MOTIONS TO DISMISS OF RECEIVERS OF SEABOARD AIR LINE AND PAGE AND HARRIS

(Caption and Title omitted)

Upon consideration of the records and motions to dismiss for want of jurisdiction filed on behalf of defendants, H. A. Page, Jr., C. F. Harris, Fort Benning Railroad Company, and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company:

It is ordered, That said motions be, and they are hereby, denied.

By the Commission.

George B. McGinty, Secretary. (Seal.)

* * * * * * *

It is further stipulated that the petitions of intervention filed by several shippers claiming to be interested in the proceeding, and the orders allowing such interventions, need not be made a part of the record, the substance of

their testimony being hereinafter incorporated in the narrative of testimony.

The testimony of the witnesses in Docket No. 26483, stated in narrative form, is as follows:

Atlanta, Georgia, June 14, 1934.

Before W. P. Bartel, Director of Service

APPEARANCES

T. M. Cunningham, Savannah, Georgia, for the Receivers of the Central of Georgia Railway Company, Complainant.

[fol. 124] W. R. C. Cocke and Chas. T. Abeles, Norfolk, Virginia, for Receivers of Seaboard Air Line Railway Company, Defendants.

A. J. Ribe, Birmingham, Alabama, for Southern Cement Company.

Ed Gubernator, Allentown, Pennsylvania, for Lehigh Portland Cement Company.

E. L. Hart, Atlanta, Georgia, for Atlanta Freight Bureau, Birmingham Traffic Association, Algernon Blair and J. A. Jones Construction Company.

James J. Bethune, Birmingham, Alabama, for Alpha Portland Cement Company.

Moultrie Hitt and G. Kirby Munson, Washington, D. C., appearing specially for Page & Harris.

Captain Ed C. Betts, U. S. Army, Fort Benning, Georgia, for Secretary of War.

John B. Keeler, Pittsburgh, Pennsylvania, for Wood Preserving Company.

PROCEEDINGS

Director Bartel, after announcing the hearing, called for appearances, whereupon those previously listed were recorded by the several counsel. Mr. Hitt stated that his appearance was special for the purpose of filing and supporting the motion of Page & Harris to dismiss the complaint, and Director Bartel replied that the motion had been denied. Captain Betts explained that he was attending the hearing in the interest of the Federal Government and for the purpose of preserving the status quo. Direc-

tor Bartel described the issues presented by the complaint and called for the complainant's first witness. Mr. Cocke, having received permission to make an opening statement on behalf of the defendant Receivers of Seaboard Air Line Railway Company, called the attention of the Director to the fact that the complaint failed to set forth with requisite clarity and certainty the contentions of the complaint, or [fol. 125] any cause of action cognizable by the Commission; and that for these reasons the Receivers of the Seaboard had filed a motion to dismiss the complaint on the ground that the Commission was without jurisdiction to entertain it. Director Bartel announced that the motion had already been denied by the Commission, and called for the complainant's first witness.

Before proceeding with his examination Mr. Cunningham asked for the right to introduce the evidence before the Commission in Docket 9709. Upon objection by Mr. Cocke that the offer was not in conformity with the Commission's rules in that the record was not offered physically and incorporation by reference was permissible only if it was accompanied by a designation of the parts of the evidence to be relied upon, Director Bartel suggested that counsel seek to agree later with respect to the matter, and reserved his ruling upon the admission of the record. Thereupon, Mr. Cunningham called his first witness.

Testimony of W. McN. Knapp

By Mr. Cunningham:

I am, and since July 1, 1932, have been, Traffic Manager for the Receiver of the Central of Georgia Railway Company. Under date of January 15, 1934, Captain R. E. Shannon, Quartermaster's Assistant, in the Quartermaster Corps at Washington, who represents the Quartermaster General in matters relating to traffic relations between the Quartermaster General and the railroads, wrote Mr. Allan Browning, Commercial Agent for the Receiver of the Central of Georgia Railway, who is under my jurisdiction, with reference to the general subject of freight transportation to Fort Benning. This letter is introduced as Exhibit 1. Subsequently, under date of February 2, 1934, another letter on the same general subject was received from Captain Shannon, which is introduced as Exhibit 2. My depart-

ment replied to this latter letter by telegram from the General Freight Agent of the Central of Georgia Railway, Mr. Chancellor, under date of February 9, 1934, and this telegram, a copy of which is offered as Exhibit 3, was followed by a letter from our General Freight Agent to Captain Shannon dated February 9th, a copy of which is offered as Exhibit 4.

[fol. 126] Subsequently Mr. Chancellor received a telegram dated February 14th from General Williams, the original of which is offered as Exhibit 5, and Mr. Chancellor replied by telegram on February 17th, a copy of his reply being offered as Exhibit 6.

Mr. Chancellor received another wire under date of February 19th from General Williams, a copy of which is offered as Exhibit 7, and under date of February 20th replied by telegram, a copy of which is offered as Exhibit 8.

On February 20th Mr. Pollard, Receiver of the Central of Georgia, wired General Williams, a copy of his telegram being offered as Exhibit 9, and on February 21st General Williams replied to Mr. Chancellor's wire to him of February 20th (Exhibit 8), a copy of this wire being offered as Exhibit 10. In this last mentioned wire General Williams took the position that the Central of Georgia had to make its own arrangements on Government traffic with Page & Harris for the transportation of traffic from Fort Benning Junction to the Fort, and that we could not make arrangements with the Government for the payment for transportation of freight from Fort Benning Junction to Fort Benning, in other words, that we must make such arrangements with Page & Harris.

On February 21st Mr. Chancellor advised General Williams by wire that on Government freight we would allow Page & Harris the same amount for carrying freight from Fort Benning Junction to the Fort as did the Seaboard Air Line. A copy of this telegram is offered as Exhibit 11.

On February 23rd Mr. Pollard wired General Williams that he had reached agreement with Page & Harris for handling Government freight on the same basis as such freight was handled by the Seaboard. A copy of this telegram is offered as Exhibit 12. I shall show later just what arrangement was made.

On February 23rd General Williams wired Mr. Chancellor with reference to the same subject, a copy of this wire

being offered as Exhibit 13. On February 24th Mr. Chan-
[fol. 127] cellor replied to General Williams, a copy of the reply being offered as Exhibit 14. On February 26th General Williams advised that the arrangements which had been made by us for handling Government freight to Fort Benning were satisfactory, a copy of his telegram being offered as Exhibit 15. Under date of February 26th General Williams wired Mr. Cunningham, the original of this telegram being offered as Exhibit 16.

About this time discussion ensued between the Central of Georgia and Army officers as to whether the arrangements which the Central of Georgia had completed for paying Page & Harris for handling Government freight would apply on freight moving on commercial bills of lading that might be consigned to some officer of the Government at the Post. Under date of March 20th Colonel Patrick C. Guiney, of the Quartermaster Corps at Washington, wired Mr. Chancellor inquiring as to this, the original of this wire being offered as Exhibit 17. On March 21st Mr. Chancellor replied to this inquiry, a copy of this telegram being offered as Exhibit 18. About the same time Captain R. B. Lovett, at Fort Benning, wrote Superintendent Baldwin of the Central of Georgia a letter, later quoted in a wire sent by Mr. Baldwin to Messrs. Pollard, myself and others at Savannah. A copy of the wire quoting this letter is offered as Exhibit 19. Mr. Baldwin, who is Superintendent of the Central at Columbus, Georgia, replied to Captain Lovett under date of March 22nd, a copy of the reply being offered as Exhibit 20.

Subsequently, on April 9, 1934, Colonel J. DeCamp Hall, in the Quartermaster's Department at Fort Benning, wrote a letter to Mr. Wade, the Division Freight Agent of the Central, with reference to this matter. This letter was forwarded to me, and a copy is offered as Exhibit 21.

The general situation with reference to the transportation of Government freight at Fort Benning which was the occasion for the exchange of telegrams and letters which have been introduced as Exhibits 1 to 21, inclusive, is as follows. Up to the time the Seaboard Air Line filed its tariff, to be offered in evidence later, by which the Sea-
[fol. 128] board absorbed switching charges from Fort Benning Junction to Fort Benning. Government freight handled by the Seaboard and the Central of Georgia up to

Fort Benning Junction was turned over to Page & Harris, who performed the movement between Fort Benning and the Fort Benning Reservation in both directions. For this service Page & Harris were paid by the Government. (At this point in response to Director Bartel's comment that there was nothing in the tariff which indicated any absorption of switching charges, but merely an extension of the Fort Benning switching limits to include Fort Benning, Mr. Cunningham replied that he did not know what the tariff meant, but that it spoke for itself, the tariff to which he referred being a part of the complaint). Up to the time this tariff was filed we were paying nothing for this service, the Government's payment being $5.00 per car on all Government freight. The correspondence began by a notice from the Quartermaster General's office that they could no longer give the Central a haul to and from Fort Benning Junction on Government freight because the Seaboard, as the Quartermaster expressed it to us, had agreed to absorb switching charges of Page & Harris for handling this freight between Fort Benning Junction and Fort Benning. The Central was told that if they wanted to participate in Government freight they would also have to make this absorption. As a result of the correspondence which ensued we finally acquiesced in the Government's suggestion, and arranged with Page & Harris to pay them $12.50 per car. At the outset of the correspondence we were under the impression that the Seaboard was paying only $5.00 per car and that we would pay the same amount, but it later developed that this payment amounted to $12.50 per car, and we acquiesced in the same arrangement.

Subsequently it appeared that there was a good deal of freight moving to the Military Post consigned to the officers of the Government on other than Government bills of lading on which the owner paid the freight, and on this traffic we refused to apply the arrangement to which we [fol. 129] had agreed on Government movements. The Government finally acquiesced in our position in this respect. As a result, on all freight not moving on Government bills of lading the Central pays nothing to Page & Harris.

The Seaboard's tariff went into effect on December 4, 1933, and between that date and the time when the Central agreed to pay Page & Harris $12.50 per car on Government

freight the Government had been paying Page & Harris $5.00 per car on the freight moving via the Central up to Fort Benning Junction. Upon our agreement to make the payment to Page & Harris the latter were to refund to the Government the $5.00 per car which the Government had already paid to them on that particular traffic.

Turning now to our correspondence with Page & Harris, I have a copy of a letter written by them jointly to the agents of the Central and of the Seaboard under date of October 18, 1932, describing the arrangement under which Page & Harris would handle freight over the Government-owned railroad between Fort Benning Junction and Fort Benning, Georgia. This letter, which is introduced as Exhibit 22, was written the day after we had received notice from the Government that our right to operate the railroad would cease. The rates which we had previously published to and from Fort Benning were cancelled effective October 18, 1932. The rates to and from Fort Benning Junction, however, were left in effect. The Seaboard likewise cancelled its tariffs to and from Fort Benning proper, and thereafter there were no published rates into Fort Benning via either the Seaboard or the Central.

I now introduce as Exhibit 23 a printed notice issued under date of January 3, 1934, by Page & Harris stating that for the movement of an entire car and its contents, and the rate of the empty car, between Fort Benning Junction and any related spotting location within the Military Reservation which may be available, and on which the common carrier service of the Central of Georgia has ended or has not begun, Page & Harris' charges would be $12.50 per car. [fol. 130] The Central availed of this service extended to them by Page & Harris only on Government freight.

The second paragraph of the notice stated that for the movement of cars between the point designated as the "receiving and delivery tracks" at the Military Post and any selected spotting location which may be available, and on which the common carrier service of the Seaboard Air Line has ended or has not begun, Page & Harris' charge would be $5.00 per car with contents of 10,000 pounds or over. The privileges extended by paragraph 2 of this notice have never, so far as I know, been made applicable on traffic delivered at Fort Benning Junction by the Central of Georgia. By letter dated February 5, 1934, the original of

which is introduced as Exhibit 24, Page & Harris referred to the Seaboard's tariff Sixth Revised page 139, I. C. C. No. A-6826, effective December 4, 1933, and expressed their willingness, as private contract operators of the Government-owned railroad at Fort Benning, to perform service for the Central on the same basis as they did for the Seaboard. We did not avail ourselves of this offer. By letter dated February 20, 1934, to Mr. Pollard, the original of which is introduced as Exhibit 25, Page & Harris advised that they would thereafter handle no freight for the Central of Georgia on the Fort Benning line. I have no information as to whether a reply was made to this letter.

On February 21, 1934, Superintendent Baldwin of the Central of Georgia wrote a letter to Mr. Harris of the Fort Benning Railroad outlining the payments that would be made by the Central of Georgia, and the terms on which those payments would be made, on Government freight. This letter is introduced as Exhibit 26, and the arrangements there described are those under which we are now working on Government freight.

On March 17, 1934, Mr. Baldwin wrote to Page & Harris with reference to freight moving to Government officers at Fort Benning not on Government bills of lading, stating that for the present and until further notice the Central could only pay the agreed amount on cars of freight moving on Government bills of lading consigned to the Government at Fort Benning, and asserting that since there was no published tariff it would be a violation of law to make any payments to Page & Harris for freight moving on com-
[fol. 131] mercial bills of lading. A copy of this letter is introduced as Exhibit 27. Under date of March 18, 1934, Page & Harris replied that thereafter and until further notice they would receive from the Central at Fort Benning Junction only such Government freight as was moving on Government bills of lading, that shipments not moving on Government bills of lading would not be handled by them, and that the use by the Central of the interchange tracks at Fort Benning Junction or any other trackage facilities leased to Page & Harris by the Government for such shipments not moving on Government bills of lading was prohibited. The original of this letter is introduced as Exhibit 28.

I have, and now introduce as Exhibit 29, a copy of the Seaboard Receivers' Tariff Sixth Revised page 139, I. C. C. A-6826. In connection with this tariff I call attention to paragraph 9 of the complaint in this case referring to a tariff of the Seaboard which was on file with the War Department, which tariff is identified in the complaint as original page 148, I. C. C. A-6826, and is identified in all respects with Sixth Revised page 139, I. C. C. A-6826, quoted in paragraph 8 of the complaint, with the exception that the new tariff omitted the words "reciprocal" before the word "switching". The records of the Interstate Commerce Commission, however, do not show that this tariff was ever filed with it.

In the complaint in this proceeding reference is made to the Articles of Association of the Southern Freight Association. I have these Articles of Association with me. (Here follows objections by Mr. Cocke that these Articles have no relevancy to the issues of the case. Mr. Cunningham explained that they required members of the Association, among which were the Receivers of the Seaboard, to notify the Chairman of the Association of any action proposed to be taken by tariff, that this notice was not given with respect to the tariff under attack in this proceeding, and that for that reason the Central had not made objection to the tariff before it went into effect. It was then agreed that the Articles referred to by the witness are correctly set forth in paragraph 8 of the complaint in Docket 26483.)

[fol. 132] I first knew of the filing of this tariff when Mr. Capps (Chief Traffic Officer for the Receivers of the Seaboard) told me about it in Mr. Pollard's office in Savanah on December 11, 1933. No information had at that time been given to the Southern Freight Association officials. I assume that it was posted in the regular way. We received our copy from the Seaboard on December 26, 1933.

On February 9, 1934, the Receiver of the Central made application to the Commission for authority to publish on one day's notice a tariff similar to the Seaboard switching tariff, which was published effective December 4, 1933. This application was denied by the Commission February 26, 1934. (A copy of the application was introduced in evidence as Exhibit 30 and the order denying the application was introduced as Exhibit 31. These Exhibits are not cop-

ied because the parties have agreed that the substance of them is as herein set forth and that they are otherwise immaterial).

Freight tariffs were in effect up to October 18, 1932, publishing rates to and from Fort Benning, Georgia. Both the Central and the Seaboard were parties to these freight tariffs. Effective October 18, 1932, these tariffs publishing rates to and from Fort Benning, Georgia, were cancelled and thereafter the rates were published to and from Fort Benning Junction. On and after October 18, 1932, there have been no tariffs either of the Seaboard or the Central publishing rates to Fort Benning, Georgia. (The witness introduced in evidence as Exhibit 32 a list of typical tariffs of Central of Georgia publishing rates to and from Fort Benning which were in effect October 17, 1932, and the witness also introduced as Exhibit 33 the tariffs which went into effect on October 18, 1932, to and from Fort Benning Junction, Georgia. Neither of these Exhibits is copied because the parties have agreed that the substance of them is as herein set forth and that they are otherwise immaterial).

When a shipment via the Central of Georgia is intended for Fort Benning or the Fort Benning Military Reservation [fol. 133] we make payments out of our revenue for the handling of such shipments between Fort Benning Junction and Fort Benning only on Government freight. When the shipment is not covered by a Government bill of lading or the Government does not pay the freight charges to us the contractor pays Page & Harris their charge of $12.50 per car for the movement from Fort Benning Junction to Fort Benning. This charge includes all spotting service in the Government Reservation by Page & Harris. On the other hand, if it moves via the Seaboard to Fort Benning Junction the Seaboard pays Page & Harris $12.50 per car from the Junction to what is called the regular receiving and delivery tracks within the Reservation, and Page & Harris collect from the contractor $5.00 for such further service as may be rendered by Page & Harris for spotting on other tracks within the Reservation, making a total of $17.50 per car, which Page & Harris receive on other than Government freight moving via the Seaboard to or from Fort Benning Junction.

If on traffic moving via the Central the line-haul revenue of the Central is less than $25.00 Page & Harris have agreed

to accept less than $12.50 per car. That, however, relates only to Government freight, the Central having no contract or arrangement with Page & Harris for handling any freight other than that of the Government.

It is my understanding that under the existing arrangement between Page & Harris and the Seaboard with respect to freight other than Government freight the Seaboard pays Page & Harris $12.50 and the contractor pays Page & Harris an extra $5.00 for taking it beyond the receiving tracks within the Military Reservation, making a total of $17.50. If the shipment moves to Fort Benning Junction via the Central of Georgia it costs the contractor $12.50 per car to get it from Fort Benning Junction to its final location within the Reservation.

Cross-examination.

By Captain Betts:

In using the expression "freight consigned to officers other than Government freight" I meant a shipment con-
[fol. 134] signed to the Quartermaster at Fort Benning on which the shipper and broker of foodstuffs, for example, pays the freight charges to Fort Benning Junction. Because the broker pays the freight charges it is not Government freight. By "freight moving on Government bills of lading" I meant either that actually moving on such bills of lading or a shipment on which the Government would make direct settlement with the Central of Georgia for the freight charges.

By Mr. Cocke:

The Central of Georgia's operation of the Fort Benning line was discontinued October 17, 1932, following a notice from the War Department that on and after that date our lease of the Fort Benning Railroad was cancelled and terminated. This notice, as I recall, was received about September 17th or 18th. Prior to that time we had operated freight service on the line from June, 1924, and passenger service for some time previously. I do not know whether we filed an application with the Interstate Commerce Commission for authority to discontinue the service or cease operation over the line prior to its actual discontinuance. We did file tariffs with the Commission explaining the rea-

sons why we were discontinuing operation. These are the tariffs cancelling the previous tariffs to and from Fort Benning. I do not know whether we secured authority from the Commission to abandon the service, although I think that I would know if we had done so. (Mr. Cunningham then stated that no such application had been filed with the Commission because, according to his view, none was necessary. Then followed a discussion between Mr. Cunningham and Director Bartel regarding the necessity of obtaining a certificate from the Commission authorizing the abandonment of the service in question, Director Bartel calling attention to a decision of the Commission to the effect that authority to abandon a leased line was necessary notwithstanding the termination of the lease.)

At one time during its operation of the Fort Benning track the Central had provided twice-a-day service, in the [fol: 135] morning and in the afternoon, but prior to the final discontinuance of operation it curtailed that service to one trip in the morning for a brief period of a month or six weeks. Long before the discontinuance of our operation, however, we had restored the twice-a-day operation in response to a request from the officers. Although I am not familiar with the reasons, it is my information that the temporary curtailment of the service was due to the fact that the business was small and it was less expensive to serve the Post with one trip a day than with two trips a day.

The reason given by the Government for cancelling the license of the Central of Georgia to operate the line was that the service was unsatisfactory. I do not know whether any reply was made to the letter, filed as Exhibit 24, from Page & Harris expressing their willingness to make the same arrangements with the Central for the handling of traffic between Fort Benning Junction and the Reservation as those in effect with the Seaboard. I understand that Mr. Baldwin, our Superintendent at Columbus, and Mr. Wade, our Division Freight Agent, conducted certain negotiations on this matter, and they are both present today.

If we make any change in our switching arrangements at Columbus, Georgia, or in our rates we file a proposal with the Southern Freight Association, but we do not file such proposal if the change merely involves the limits within which we perform switching service at Columbus. If the

action has the effect of changing a rate to or from Columbus, Georgia, we would file the proposal with the Chairman of the Association. Merely extending switching limits would not necessarily have the effect of changing the rate.

At the time the Central of Georgia was operating the Fort Benning line it collected certain arbitraries over the Fort Benning Junction rate for the haul between Fort Benning Junction and the Military Reservation. That tariff is listed in Exhibit 32. These arbitraries were in effect up to the time the Central discontinued its operation. Our Sixth Section Application for leave to file a tariff extending the switching limits of Fort Benning Junction to include the Military Reservation was filed on February 9, 1934. After this application was denied the Central did not sub- [fol. 136] mit to the Commission a similar tariff to become effective after thirty days.

By Director Bartel:

All of the track of the Fort Benning Railroad now operated by Page & Harris is within the limits of the Military Reservation. The operation of Page & Harris is entirely over the Government-owned track.

At the present time the Central has no right to operate this track. The contract between the Government and Page & Harris is exclusive, and cannot be sub-let without the authority of the War Department. We have not been authorized by Page & Harris to operate over that track.

By Mr. Cunningham:

I shall investigate to determine whether any reply was made to Page & Harris' letter filed as Exhibit 24.

Testimony of T. B. Wade

By Mr. Cunningham:

I am Division Freight Agent for the Receiver of the Central of Georgia Railway Company, with headquarters at Columbus, Georgia, where I have been located since 1908. I am familiar with the operations of the Fort Benning Railroad and have been since before Page & Harris took over its operation, having kept in daily touch with it.

I have a statement which shows the amount and number of carloads of freight carried to and from Fort Benning, via both the Central of Georgia and the Seaboard, and for the Government, contractors and others, from October 19, 1932, to and including June 8, 1934. This statement is introduced as Exhibit 34. (The exhibit covers the period October 1, 1933, to June 8, 1934, inclusive, the text of the record, however, reading as above.) This exhibit was compiled from daily information received from our Agent at Fort Benning Junction. The data with reference to the Seaboard's movements is also obtained from our Agent at the Junction who gets it from Page & Harris. It is also available to the Seaboard.

I know of no one, living between Fort Benning Junction [fol. 137] and Fort Benning, who avails of the service of the Fort Benning Railroad. There is no siding or stop between the two points. A few farmers live in the adjacent territory, but not within the Reservation, but these do not use the Fort Benning line for commercial purposes. The freight moved over the line is exclusively for the Government and the contractors doing work at the Fort. A few cars of scrap iron and salvaged material are shipped out from the Fort yearly. Any one who has occasion to use the Railroad does so, the Fort Benning Railroad hauling for all contractors who have use for their services.

I do not know of any civilians living at the Fort. Those who work there reside in Columbus. Any one wishing to buy salvaged materials from the Government and ship them out uses the Fort Benning Railroad, we having had several cars of such materials recently.

With reference to the double daily service to and from Fort Benning, this was withdrawn for a short period, but was restored several months before the license of the Central of Georgia was cancelled. I do not know whether Page & Harris have ever performed double daily service since they have been operating the road.

I should like to state that when complaint was made to me that double daily service was desired, it was restored the following day. We were once called upon to carry two cars of cement to Fort Benning and in thirty minutes they were on their way to Fort Benning. This is mentioned to show that the service asked for was given.

Cross-examination.

By Mr. Cocke:

My headquarters are at Columbus, but my jurisdiction extends to Fort Benning Junction, including the operation of the Central of Georgia at the connection track at that point.

I did not participate in the conference with the officers of the War Department regarding the letter of February 5th from Page & Harris offering to the Central of Georgia the same arrangements that were in effect between Page & [fol. 138] Harris and the Seaboard under the tariff involved in this proceeding. That was an operating matter, and I am sure it was handled in the office of Mr. Baldwin, our Superintendent.

At the present time a large amount of construction is being carried on within the Reservation. Referring to Exhibit 34, Item B shows the traffic which, because it moved to the contractors engaged on work within the Reservation, will cease when the construction projects now in progress are completed. Item A represents Government freight, and Item C the total of the contractors' and the Government's freight.

During its operation of the Fort Benning line the Central placed the cars within the Reservation under the direction of the officers of the War Department, the further spotting within the Reservation being performed by the War Department with its own crews and equipment. Our services ended at the station.

Testimony of W. McN. Knapp (Recalled)

By Mr. Cunningham:

I have calculated the revenue derived by Page & Harris on that part of the traffic shown on Exhibit 34 from January to June 8, 1934, inclusive. The calculation is based on the assumption that Page & Harris received $12.50 per car on each car handled by the Central of Georgia whether for the account of the Government or the contractors. With respect to the traffic handled by the Seaboard, I have assumed that Page & Harris received $12.50 from the Sea-

board on all traffic and an additional $5.00, or a total of $17.50 per car, on contractors' freight. On this basis my calculation shows that from January 1st through June 8th, 1934, Page & Harris received $24,927.50. In addition to this amount Page & Harris are paid $1,000 per month for intra-Reservation switching service. The amounts by months are: January $2,667.50; February $3,605; March $5,200; April $5,490; May $6,387.50; June 1st to 8th inclusive $1,577.50.

[fol. 139] By Director Bartel:

We are paying Page & Harris $12.50 per car on all Government traffic handled by Page & Harris and moving on Government bills of lading. I am not sure whether we pay this amount when our revenue is less than $25.00. If we are paying less on such traffic my calculations would be changed.

By Mr. Cunningham:

On less than carload Government freight I think it is customary to assemble this at our Columbus freight station in 10,000 or more pounds in order to get the benefit of the $12.50 per car carload rate. I am not positive as to this. On less than carload freight not so assembled Page & Harris receive from us 12½¢ per 100 pounds. $12.50 per car is the maximum.

Testimony of Claude Baldwin

By Mr. Cunningham:

Referring to Exhibit 24, in which Page & Harris wrote Mr. Pollard offering to perform the same service for the Central of Georgia on the same terms as they performed for the Seaboard, I had no conference about this matter and I know of none that we ever had. With reference to the question of the Director as to what switching service the Central performed when it operated the Fort Benning track under license from the War Department, we switched any freight that did not have to be weighed. The Government, however, wanted practically all their freight weighed and in order to avoid paying the weighing charges

in the event there was no discrepancy they preferred to use their own crews and equipment for the intraplant switching. Cars, such as gasoline going to the warehouse which did not have to be weighed, we placed in accordance with their directions.

By Director Bartel:

I understand that the present receiving and delivery track covered by the Seaboard's tariff is the track at the warehouse adjacent to the main line. Under the arrangements with the War Department we performed any service they wanted even though it extended beyond the present [fol. 140] so-called delivery track. The scales to which I referred are approximately 75 feet from the warehouse which I presume, although I do not know, is at a point about 2000 feet from the end of what we call the Government track at the lower end. At any rate while the Central was operating the Fort Benning track it performed the service on any track within the Reservation except that leading to the roundhouse, provided the War Department wanted cars placed on these tracks. The arbitrary charged from the Junction contemplated deliveries on this basis.

By Mr. Cunningham:

We are anxious to do all the switching within the Reservation except beyond Wald Avenue and down to the roundhouse, but the Government preferred to do most of it themselves.

I am familiar with the present operations at Fort Benning. Page & Harris are carrying all traffic for all persons who offer it in carload lots. I do not know that anything is going in there in less than carload lots. We consolidate all less than carload freight into one car at our freight house. I do not know whether any less than carload freight is going to any of the contractors.

Cross-examination.

By Mr. Cocke:

The traffic which the Army's own engines and crews switched during the period of the Central of Georgia's operation consisted of coal, grain and any commodities that

they wanted to weigh on their track scales before placing. So far as I know, they did no other switching. If they did so it was of their own choice. The switching that we did consisted of placing cars at the warehouse and the spotting of gasoline at their unloading rack.

I do not know that 98% of the cars that were taken in by the Central of Georgia during the period of its operation were weighed by the Government after their receipt from the Central of Georgia. I do not know what that percentage would be. As a pure guess I should say about [fol. 141] 25%.

Testimony of H. D. POLLARD

By Mr. Cunningham:

I am Receiver of the Central of Georgia Railway Company and was President of the Company up to the time of the receivership which began on December 19, 1932.

On December 11, 1933, I held a conference with Mr. Capps with reference to the Fort Benning matter, at which I heard for the first time of the Seaboard tariff which is the subject of the complaint in this proceeding. Mr. Capps said that he wished to discuss with us an allowance to be made to the Fort Benning Railroad for handling business from Fort Benning Junction to Fort Benning, stating that Page & Harris had suggested a charge of $15.00 a car, that he, Mr. Capps, had in mind $12.50, and he asked if we would be willing to pay the latter amount. I told him that I saw no reason why the Railroads should give up their revenue to these people without compensating benefits, and that we would pay nothing until we had to. Mr. Capps stated that he would think the matter over and decide what he was going to do.

On December 16th he wrote me a letter, which I introduce as Exhibit 35, and subsequently I received another letter from him dated January 27, 1934, with reference to the matter, which is introduced as Exhibit 36. On January 30th I replied to Mr. Capps' letter of January 27th asking him what were the "subsequent occurrences" referred to in that letter and inquiring what he proposed to do. A copy of my letter is introduced as Exhibit 37. I received no reply to my letter, but later I saw Mr. Capps and, as I

understood him, he said that he referred to our having taken the matter up with the Commission. I explained to him, and later confirmed, that we had not done this until after his letter was written, and further found that the only thing that any of our people did was to inquire of the Commission about this tariff concerning which we could get no information. We did not make any complaint to the Commission until February 13th, more than two weeks [fol. 142] after Mr. Capps' letter of January 27th.

On February 10th, 1934, I telegraphed the Secretary of War inquiring whether there had been any change in the lease and contract with Page & Harris. A copy of this telegram is introduced as Exhibit No. 38. On March 6th I received a reply, a copy being introduced as Exhibit 39, stating that there had been no such change.

With reference to the letter, Exhibit 24, from Page & Harris offering the Central of Georgia the same arrangements over the Fort Benning line as were given the Seaboard, I think, though I am not sure, that that letter was answered. At any rate, we accepted the proposal only with regard to Government bill of lading freight.

Cross-examination.

By Mr. Cocke:

I first ascertained that the Seaboard had filed this tariff when Mr. Capps came to our office on December 11th. At that time Mr. Capps was talking about what arrangement he would make with Page & Harris and stated that he had not yet determined what he was going to do. I do not know when I finally learned that the Seaboard was paying Page & Harris $12.50 per car, and could not say without consulting our files, which are not available. I knew nothing, however, prior to Mr. Capps' letter of January 27th (Exhibit 36).

I do not know whether I answered his first letter of December 5th. He discussed the matter with us at length, and when the conference ended we did not know what he was going to do. He said that he would go home and write us, which he did. My position with reference to the matter has always been that the Government should get the best possible bargain they could and should not be made to pay more than they could get the service for. We have offered to do it at no greater cost than that. (Then follows a col-

loquy between Mr. Cocke and Mr. Cunningham to the effect that the complaint in the proceeding was transmitted to the Commission on February 13th with request that it be filed, that there was some delay in the actual filing, probably due, according to Director Bartel, because of the Commis-[fol. 143] sion's effort to adjust the matter informally, whereupon the cross examination was continued.)

I do not think we knew definitely what the arrangement was between the Receivers of the Seaboard and Page & Harris as late as February 13th but we had sufficient information to frame the complaint. On that date I wrote a letter to Page & Harris reading as follows:

"I wish to acknowledge your letter of February 5th. We are trying to get definite information as to just what is being done with regard to this matter by the Seaboard Air Line Railway, which we expect to do within the next few days and will communicate with you further."

I think I communicated further with Page & Harris after this letter, but at any rate we finally got together on the Government freight.

Testimony of Claude Baldwin (Recalled)

By Mr. Cunningham:

With reference to the switching at the Fort, during the period of its operation of the Fort Benning line and while building was going on the Central of Georgia did the spotting of all the freight for the contractors with our own engines. (Mr. Cunningham announced the complainant's case closed. Mr. Cocke advised the Director that the respondents withdrew their objection to the introduction of the record in Finance Docket 9709 provided that the entire record was placed in evidence, and with that understanding the record in that proceeding was received.)

Testimony of C. R. Capps

By Mr. Abeles:

I am Chief Traffic Officer of the Receivers of the Seaboard Air Line Railway Company and have occupied this position for many years.

With reference to that part of the complaint asserting that the method in which the tariff complained of in this proceeding was published violates the Articles of Association of the Southern Freight Association I introduce as Exhibit 40 a letter from Chairman Tilford of the Southern Freight Association dated June 11, 1934, in which he mentions two illustrative cases, both relating to changes in [fol. 144] switching limits involving matters of changes of rates. In the Fort Benning case no change of rate was involved, there having been no rate published to Fort Benning at the time, nor now. The only effect of the establishment of the switching limits at Fort Benning was to broaden the application of the Fort Benning Junction rates. As a matter of fact both of the Commission's reports in Finance Docket 9709 pointed out the fact that the Receiver of the Central of Georgia had offered to apply Fort Benning Junction rates at Fort Benning without the addition of the old arbitraries. This offer antedated the Seaboard Air Line's tariff extending its Fort Benning Junction switching limits, and was made by the Receiver of the Central of Georgia without reference to either the Southern Freight Association or the Seaboard Air Line. I do not recall a single instance in my long experience where a matter involving switching limits alone has come before the Southern Freight Association.

Paragraph 13 of the complaint charges that the tariff in issue in this case and the arrangements between the Receivers of the Seaboard and Page & Harris are in effect a scheme to avoid and break down the order of the Commission in Finance Docket 9709. As I read the Commission's opinions and orders in that case they merely deny the Fort Benning Railroad Company's application for a certificate. Nowhere in that opinion or order is it even inferred that the transportation charges from or to the receiving and delivery tracks at Fort Benning should be greater than the charges from or to Fort Benning Junction.

With reference to the charge of the complaint that through this tariff the Receivers of the Seaboard are seeking to extend their operations from Fort Benning Junction to Fort Benning proper without a certificate from the Commission, it is only necessary to say that the Seaboard has not extended its operations at Fort Benning Junction. It has merely broadened the application of its Fort Ben-

ning Junction rates by an extension of the Junction switching limits. No new stations have been established, there [fol. 145] having been no track construction and the Seaboard's power not going beyond the connection tracks. The only thing we have done is to extend our service through the employment of agents. The situation is no different from the frequent occasions on which we have changed and extended our switching limits in order to take in industries outside of the existing limits.

By Director Bartel:

Where a shipper has a side track and requests us to give him service we have the right to operate over the side track. With regard to the Fort Benning track we have the right to operate, so far as Page & Harris are concerned, subject to the approval of the War Department, which has not yet been definitely given. We have not extended our operation by the tariff in controversy. We have extended our service by the employment of agents, but as far as the railroad's operations are concerned they are just what they were before. So far as the War Department is concerned, we had not been given a definite right to operate the track and have not today.

By Mr. Abeles:

Paragraph C of Section 13 of the complaint claims that the tariff is in violation of paragraph 1, Section 6 of the Act to regulate commerce in that it is obscure and difficult to interpret. The tariff has but one meaning to us, and apparently has but one meaning to the Commission, since the latter has never criticized it on the ground of its obscurity. In fact, I doubt whether it could have been made clearer.

By Director Bartel:

We had some correspondence with the Commission about the tariff in which the Commission criticized the tariff on two grounds: one with respect to its legality and the other calling attention to a violation of the Commission's tariff rules. The latter criticism, that Fort Benning Junction had not been made to appear in the tariff index at the time of the publication, was met by filing a new index sheet.

[fol. 146] By Mr. Abeles:

After this was done no further complaints were received from the Commission.

Paragraph D of Section 13 of the complaint charges that the tariff is unlawful because there are no reciprocal arrangements between the Receivers of the Seaboard and Page & Harris. The Commission later did ask about the use of the word "reciprocal," and it was then pointed out that "reciprocal switching" as used in the tariff must be read in connection with the general rules and definitions of the tariff appearing on 14th Revised page 5, where, as Item 2-A, the following appears:

"Reciprocal switching as herein used is defined as certain service performed within yard or switching limits preceding or following line-haul service to or from points without said yard or switching limits."

As used in the tariff, then, the term "reciprocal switching" is merely for the purpose of distinguishing switching and road-haul traffic from inter-plant, inter-terminal or intra-terminal switching.

With regard to the so-called tariff on file with the War Department, designated in the complaint as page 140-A to Seaboard Air Line I. C. C. A-6826, no such tariff was ever filed with the Commission. This page was prepared by the General Freight Agent's office to clarify the question which had been raised as to the use of the term "reciprocal switching". When this came to my attention I pointed out that that difficulty was already taken care of in the rules and definitions of the tariff and the copies which had been prepared were destroyed. Two copies, however, had been previously given to Mr. Page, one of which I take it he gave to the War Department. That is the entire explanation of page 140-A.

With regard to the physical situation at Fort Benning Junction and the Reservation the Seaboard has made no investment nor spent any money in construction work, extension of tracks and the like, nor so far as I know do we intend to make any such investment. It may have spent [fol. 147] a few dollars in maintenance, but nothing beyond that.

Concerning the possibility of operating the Fort Benning track with the Seaboard's crews and equipment, I do

not believe that adequate and satisfactory service to the Fort could be rendered by one round trip per day. Past experience has demonstrated the necessity of morning and afternoon service, though not necessarily every working day. It is impossible to forecast today whether tomorrow a morning switching service will suffice or whether morning and afternoon service will be required. That can only be determined on very short notice.

The Receivers of the Seaboard have a contract covering the employment of Page & Harris as their agents, and I introduce a copy of this contract as Exhibit 41. The contract is dated June 7, 1934, but according to its terms it is retroactive to December 4, 1933, the date as of which the tariff became effective. The purpose of this contract was to put in definitive form the terms under which the Seaboard employs Page & Harris for the performance of the service which the Seaboard has assumed to perform under its tariff, so that the Commission will have those terms explicitly before it. The contract makes no changes whatsoever in the arrangements that have been existing between the Seaboard and Page & Harris since shortly after the tariff became effective.

In all calculations I have made with respect to the Fort Benning traffic I have estimated that the average normal movement inbound and outbound will be 2500 cars a year. I think that is probably somewhat in excess of past performance. Of course, when the movement of construction and other materials is particularly heavy the volume will exceed that amount during a particular month, but the figure I have given is the average normal movement year in and year out.

We have at Nocatee, Florida, a situation which is very similar to that existing at Fort Benning. The Charlotte Harbor & Northern Railway Company, whose lines the Seaboard now operates, applied to the Commission on December 5, 1921, for authority to enter into an arrange-
[fol. 148] ment with a lumber company owning a logging railroad whereby the latter would perform switching service to and from citrus fruit packing houses at Nocatee, Florida. The Secretary of the Commission under date of January 9, 1922, informed the Vice-President of the American Short Line Railroad Association, who had submitted the application of the Charlotte Harbor & Northern to the

Commission, that the matter had been considered by the Commission and that no such authority as was requested was required. A copy of this application, of the letter transmitting it to the Commission and of the Commission's reply is introduced as Exhibit 42. The arrangement which was the subject-matter of this correspondence was virtually identical with that existing at Fort Benning and Fort Benning Junction, with minor differences in the distances involved. I have no other locations in mind where a similar condition exists which might reasonably be compared with that involved here.

Cross-examination.

By Mr. Cunningham:

At the time we issued Sixth Revised Page 139, I. C. C. A-6826 we had no switching tariff to Fort Benning in effect. However, we had a switching limit at Fort Benning Junction. This was confined to our own interchange track at that station. I do not know the length of this track. I do regard the tariff as an extension of our switching limits although at the time the tariff was published we did no switching into Fort Benning.

The switching allowance made to the Fort Benning line is not stated in this tariff and appears only in the contract with Page & Harris. This contract was not made until June 7, 1934, and was not filed with the Commission until that time.

The definition of the term "reciprocal switching" as used in the tariff is found on another page of the same tariff. The word "reciprocal" is the tariff definition by which we have to be governed regardless of whether it conforms strictly to the dictionary definition. The switching which we are doing here is reciprocal switching within [fol. 149] the meaning of the tariff definition. There may be in fact no reciprocity in switching between the Seaboard and the Fort Benning Line and there is none that I know of now, but we have to be governed in the application of our tariff by the tariff definitions and limitations.

For the services rendered by Page & Harris we pay them a maximum of $12.50 per car when our revenue is as much as $25.00 per car. If our line-haul revenue is less than $25.00 we pay 50% of our revenue. The receiving and

delivery tracks mentioned in the tariff are certain tracks within the reservation on which incoming cars and outgoing cars are placed. The tariff covers only the movement to and from these designated tracks, and does not apply to the spotting of cars beyond them. We have nothing whatsoever to do with this spotting of cars, and I do not know what shippers pay for this service although I have heard and understand that they pay $5.00 to Page & Harris in addition to the $12.50.

If a shipper examines this tariff he is informed that the Fort Benning Junction rate takes his shipment to a certain track at Fort Benning. Since the only way that we can make this delivery at present is through Page & Harris, we employ them to perform this service, for which we pay them $12.50. Even if we had the right to perform the service ourselves we would employ and pay Page & Harris because it would be cheaper for us to do so. If neither we nor the Central of Georgia would pay Page & Harris $12.50 for transporting freight from Fort Benning Junction to Fort Benning a shipper could not get his freight to Fort Benning proper without paying Page & Harris unless he trucked it there.

The criticisms of the tariff by the Commission to which I referred were not made until after the tariff had gone into effect. Someone must have known about the tariff at the time it was sent them because it was received and put in the Commission's file. At the time the criticisms were made the tariff could not be suspended without a hearing.

I have no copies of the correspondence with the Com-
[fol. 150] mission on the subject of this tariff, but will be glad to have copies made. (Whereupon it was stipulated that the letters comprising this correspondence should be considered a part of the record, Director Bartel agreeing to obtain copies and place them in evidence.)

With reference to the allowance which we make to Page & Harris for the transportation of traffic from Fort Benning Junction to Fort Benning, and as to whether we regarded ourselves as under any obligations to Page & Harris in this matter: I did not induce Page & Harris to enter into any contract with the War Department, and the matter did not originate with me at all. After they had made their contract with the War Department we had said that we would make certain divisions on coal from

Alabama mines and on petroleum or gasoline from Savannah, but there has been no agreement as to divisions beyond those two movements.

I do not recall that I told Mr. Pollard that I felt under obligations to Page & Harris to make them an allowance of $12.50 per car. The situation was that at that time we had to make deliveries to Fort Benning on the designated tracks and, having no other way of making these deliveries, we had to make them through Page & Harris.

Prior to the effective date of our tariff we had no obligations to make deliveries at Fort Benning proper. Your own Receiver, Mr. Pollard, according to the records of the I. C. C. had offered to establish Fort Benning Junction rates to Fort Benning, and the record does not show that this offer was conditioned upon his operation of the track. This statement is based upon the following from the Commission's second report in Finance Docket 9709:

"The previous report shows that the Central's Receiver is willing to make the same arrangement with the Government as proposed by the applicant for the operation of the railroad facilities serving Fort Benning, to dispense with arbitraries heretofore applied between the Junction and the Reservation, to make Fort Benning a common point on both trunk line systems, charging the Seaboard only the cost of the service for switching", etc.

So far as the Seaboard was concerned this offer was staring us in the face. Mr. Pollard may not have made an effort [fol. 151] to put in the Fort Benning Junction rates at Fort Benning while Page & Harris were operating as an intermediary between it and the Government. In the C. H. & N. case the King Lumber and Manufacturing Company was a lumber company which owned a logging road.

By Director Bartel:

When we deliver traffic to Page & Harris and they deliver it on the receiving and delivery tracks intended for delivery to some contractor at a point beyond the delivery tracks the shipment is subject to the regular demurrage rules. The demurrage time begins when the cars are placed on the Fort Benning track, not on the Fort Benning Junction track. The time, I should say, would be counted from the time the cars are placed on the final delivery track, but I do not

know this to be a fact. I am not in charge of demurrage matters, but I happened to see the Manager of the Demurrage Bureau this morning and he said that after checking the demurrage records at Fort Benning they found everything was being kept correctly.

We pay Page & Harris $12.50 per car, where our revenue is $25.00 or more per car, for moving the traffic from Fort Benning Junction into the receiving and delivery tracks at Fort Benning, and it is my understanding that the contractor pays Page & Harris an additional $5.00 for spotting within the plant. In other words, Page & Harris secures a total of $17.50 per car for that service.

If Page & Harris have agreed to deliver cars of the Central of Georgia to the same interchange track for $7.50, that is a matter for Page & Harris to explain. The amount which we pay Page & Harris is in our opinion a fair allowance for the service, based on a cost study, detailed information with respect to which will be given by a witness who will follow me.

Redirect examination.

By Mr. Abeles:

Neither I nor anyone connected with the Seaboard had anything whatsoever to do with or any relation to the ar- [fol. 152] rangement entered into between Page & Harris and the War Department.

Recross-examination.

By Mr. Cunningham:

At the time Page & Harris were contemplating the operation of the Fort Benning line they came to me with a proposal for an arrangement between them and ourselves if a certificate of public convenience was granted to the Fort Benning Railroad. After several days we finally decided that we would cooperate with them, and it was some time after that before any question of divisions was settled. While I specified only divisions on coal and gasoline, I assured him we would make comparable divisions on other traffic.

If we assigned our contract and the Seaboard undertook to operate the track, under the provisions of the contract they would have to arrange the schedules in conformity with the desires of the contracting officers, but I think there would be no trouble between the Seaboard and the commanding officer as to when and what service should be rendered.

The normal average movement into Fort Benning is from 8 to 10 cars per day. I estimate 2100 cars a year as recurring business.

We go to Fort Benning Junction to move the cars to the receiving track sometimes once and sometimes twice a day. It depends upon whether the traffic is perishable freight or something that the commanding officer or someone else wants to use. We do not bring them all in at once because we can not get them all up the hill, and in addition to that deliveries are made to us at Fort Benning Junction more than once a day. The Seaboard makes deliveries at Fort Benning Junction at night and at times during the day. The Central of Georgia makes its deliveries at Fort Benning Junction at about 7:00 o'clock in the morn-[fol. 155] ing, and at other times throughout the day by special deliveries to Fort Benning Junction. We operate from about 5:00 or 6:00 o'clock in the morning until we get through. All the cars delivered by the Seaboard at night and the Central of Georgia early in the morning could not be brought in at one time because of the hill. I do not know whether heavier engines could make this possible.

By Mr. Hitt:

We must get the authority of the Secretary of War before we make an assignment of our lease. Under our operating contract it is our mandatory duty to use our best efforts to get common carrier service established into the Fort. Our contract with the Seaboard Air Line gives them the right to operate into the Fort, but we consider it necessary to get the approval of that by the Secretary of War.

By Director Bartel:

It is true that we cannot let the Seaboard operate into the Fort without the consent of the War Department. That can be had although it has not yet been granted up to this time.

Cross-examination.

(At the outset of the cross-examination objections to questions by counsel for the complainant asking for a statement of Page & Harris' revenues from traffic moving via the Seaboard were sustained by Director Bartel who asked the Seaboard to furnish the amount paid by it to Page & Harris. Similar questions with reference to traffic shipped via the Central of Georgia were ruled immaterial. Thereupon Director Bartel questioned the witness.)

By Director Bartel:

In the main we charge all contractors $12.50 per car, but I think there are some exceptions where we have to charge less to take the business away from the trucks. I am not certain as to this because I do not make such arrangements myself. I know of a contract we have to haul brick and tile at a lesser rate if the Central of Georgia ever puts in a tariff. There may be other cases. The contract I men- [fol. 156] tioned contemplates and is conditional upon the Central of Georgia's publishing a tariff extending the Fort Benning Junction rates into the Fort. I would not know definitely about such other cases because Mr. Harris would probably make the special rate. In the main, however, the charge is $12.50.

By Mr. Cunningham:

We are competing with the trucks, as I think all railroads are. We are free to make any contract on any basis we want.

There has been a change in the operating contract between Page & Harris and the Government, but no change in the lease. (Mr. Cunningham then asked the witness to produce the amended operating contract and questioned the witness with reference to the relationship between Page & Harris and the Government, to all of which objections on the ground that the cross-examination was not responsive to the direct examination were sustained by the Director. Objections to further questions by Mr. Cunningham regarding the subscribers to the stock of the Fort Benning Railroad Company, the applicant in Finance Docket 9709, were also sustained by the Examiner on the ground of irrelevancy.)

By Director Bartel:

When we get cars from the Central of Georgia or the Seaboard at Fort Benning Junction consigned to contractors we do not pay anything for their use. I can not state definitely when demurrage on cars consigned either to contractors or the Army begins to run. We are acting as agents for the Seaboard at Fort Benning, but the particular question of demurrage has not yet come up. I do not know on what basis we are assessing demurrage at the Fort, that being a detail handled by Mr. Harris.

On contractors' shipments received by us from the Central of Georgia we are acting as a private carrier for the party to whom we deliver the shipments. We are not paying the common carrier for the use of the facilities employed by us. (Questions of the witness comprising inquiries as to the operating contract dated October 16, 1932, be-
[fol. 157] tween Page & Harris and the Government were ruled by the Director to be beyond the scope of the proper cross-examination and objections to them were sustained.)

Under our contractual arrangement with the War Department we still have the exclusive right to operate over the Fort Benning tracks.

We will accept traffic consigned to contractors only if we have a contract with them.

By Mr. Cunningham:

I cannot say whether we have ever denied any contractor the right to transport freight over our line. I can say that either we have a private contract with every contractor or the Central of Georgia itself pays us for every shipment received from them that goes into the Fort. If a shipper makes a contract with us then he can ship with us. I would not necessarily know if we had ever declined to make such a contract.

There is practically no one except the Government and the contractors that ships over the Fort Benning line. I believe there is no one located between Fort Benning Junction and the Fort who uses the line. If an officer wanted to ship anything we would consider that as Government freight.

If a contractor ships something to Fort Benning to be used in the construction there, and its comes in over the Central of Georgia, who turns it over to us at Fort Benning Junction, we have a contract with the contractor in the Fort when we move the shipment. It is usually a general contract covering all shipments consigned to that particular contractor, and it is entered into before the shipments are handled by us. In some cases it may be entered into while the shipment is on its way.

Testimony of W. A. Smith

By Mr. Abeles:

I am Supervisor of Yards and Terminals for the Seaboard Air Line, with headquarters at Norfolk, Virginia. I have been with the Seaboard for 20 years, starting as a switchman and moving up through successive grades to my [fol. 158] present position. Most of my work has been in connection with terminal operations, some of it with other lines.

I am familiar with the physical conditions obtaining at Fort Benning Junction in connection with the switching of freight to and from Fort Benning Military Post, and have made an estimate of what it would cost the Seaboard to perform this switching service with its own engines and crews. I introduce as Exhibit 43 a statement showing this estimate.

This exhibit covers the operating transportation costs consisting of wages of the switch crew, the fuel and the other itemized locomotive costs. It does not include anything for traffic or other expenses.

On February 3, 1934, I made a survey of the operating conditions at the Seaboard yards at Columbus and of the Page & Harris operations between Fort Benning Junction and Fort Benning for the purpose of estimating the cost to the Seaboard of performing the services between the Junction and Fort Benning. I found that we were working one switch engine crew at Columbus, caring only for Seaboard business within the Columbus yard limits. Because of the volume of business this crew was working 1 to 4

hours over-time per day, and it was utterly impracticable to consider utilizing any part of this crew's time to provide service between Fort Benning Junction and Fort Benning.

I therefore determined by careful study that it would require the service of one yard crew to make one trip daily in the morning from Fort Benning Junction to Fort Benning, delivering loaded and other cars inbound to the Reservation and returning with outbound loads and other equipment from the Reservation. However, it was apparent that if adequate service was to be provided it would frequently be necessary to operate two round trips per day, and that incidental services required by the Government made it essential to have a crew on hand at all times for emergency purposes. These requirements could not be satisfactorily or economically made with less than two crews. Therefore the cost estimate which I have prepared contemplates the [fol. 159] operation of two crews with an L-5 type switch engine.

As previously stated, at the time I made my survey the switch crew at Columbus was earning considerable over-time. If we provided two switch crews for the switching service to and from Fort Benning it would be possible to use one of these crews for a part of the time at the Columbus Yard and eliminate the over-time earned by the crew now operating at that Yard. In making my estimate of the cost of providing switching service I have therefore taken into consideration the over-time at the Columbus Yard, and the Exhibit which I have just introduced includes this saving.

Turning to the Exhibit, it first shows the total cost of the three crews, i. e. the Columbus Yard crew and the two additional Fort Benning switching crews. The total cost of wages for these crews of $2,342.11 is based upon the existing schedules of wages, rules and regulations now in effect between the Seaboard and the train and engine service employees. Items 2 to 6 constitute other transportation charges incident to this service, totalling $2,091.56, making a grand total for wages and other items of $4,433.67.

This total, however, includes, as stated, the switching at Columbus Yard, the cost of which, totalling $2,163.40 is deducted from the total cost of the three crews, leaving

a net cost of furnishing the additional switching service of $2,270.27 per month.

This figure represents the transportation cost only, in addition to which there would be certain traffic expenses comprising the wages of the agent-yardmaster at $225.00 a month and a station hand at $45.00 a month, and also the cost of maintaining the track at $325.00 per month, making the expenses in addition to the transportation costs of $595.00 per month. These items bring the total cost of the additional switching service to $2,865.27 per month, or $34,383.24 per year.

On this basis, and assuming that 2500 loaded cars will be moved into and out of the Reservation per year, the [fol. 160] cost per car would be $13.75. From my experience in freight and traffic operation work, I do not believe that if the Seaboard Air Line undertook to perform the switching service between Fort Benning Junction and the Military Post it could be done satisfactorily and efficiently for less than $13.75 per car.

By Director Bartel:

For the cost of $13.75 per car we would make the trip from Fort Benning Junction in the morning to Fort Benning, delivering the inbound cars and bringing out the outbound cars, and a similar service later in the day, taking any cars that had accumulated during the day to the Fort and bringing back the cars that were released during the day at the Fort. In other words two services a day. On each inbound movement we would take whatever cars were waiting at the Junction at the time.

Concerning the operation in the Fort it would sometimes be necessary to do some switching in order to pick up one or two empty cars that had not been placed on the receipt and delivery track. Whether we or Page & Harris would do that switching would depend upon the arrangements made between us. Even if all of the empties were on the receipt and delivery track and all our engines had to do was to take them out to the Junction it would cost us $13.75 a car to perform the service because of the existing rules and regulations which we have, that is 8 hours a day or less constitutes a day for a switch engine crew. A crew performing three hours work would receive 8 hours pay just as it would if it worked the entire 8 hours.

I made my study on February 3rd and reported on it to Mr. Wroton. That report reads as follows:

"Mr. Benton Sunday concurred with me in the following:

"To handle as transfer movement from Fort Benning Junction to Fort Benning and return to Fort Benning Junction, all loads and empties, would necessitate one switch crew five hours' work.

"Mr. Benton to extend Columbus yard limit to include Fort Benning Junction.

"No additional supervisory or clerical force needed. Yard Conductor would book all cars handled, including time handled and seal records.

[fol. 161] "Three hours unused time switch crew can be used to some advantage in Columbus Lower Yard."

The one service per day on the basis of which that report was made was not satisfactory to the Traffic Department because there were too many inbound cars that appeared after the engine would have left for Fort Benning in the morning. The Traffic Department did not want me to prepare a study that would justify their figure of $12.50. The study was based solely on the cost of the service desired.

By Mr. Abeles:

The Traffic Department did not give me a statement of the results that I was to arrive at.

By Director Bartel:

The three hours unused time which my report states could be used to advantage in the Lower Columbus Yard has been reflected in my study by eliminating all the overtime that is now incurred by the one engine at Columbus Yard.

When my study was made on February 4th I did not contemplate that two switches per day would be required. When I found that that was necessary I made my study as I have submitted it.

Seaboard trains operate in each direction to Fort Benning Junction at night. We could switch all of the movements in the morning except in cases where we get rush cars that come to us through our connection with the South-

ern Railway. These emergency cars come to us frequently, two or three times a week, and in order to protect them it would be necessary for us to hold a crew at Columbus that would be available for the emergency service. The emergency shipments are mostly for the contractors, although occasionally one comes in for the War Department.

We would go to the expense of holding an emergency crew on hand for another shipper where the volume of business is such as to warrant it, under certain conditions for the movement of 8 or 10 cars a day.

Cross-examination.

By Mr. Cunningham:

I am not familiar with the Southern Railway's schedule [fol. 162] and do not know whether the Southern has one train a day at Columbus. My study simply shows that if we use two engines instead of one engine it would cost $2,270.27 per month to perform this switching service.

Redirect examination.

By Mr. Abeles:

I know our schedule bewteen Columbus and Richland. Our train on this line leaves Columbus between 8:30 and 9:00 o'clock in the evening, making connection with the through train between Savannah and Montgomery at Richland. This train passes Fort Benning Junction between 9:00 and 9:45 in the evening. The train in the opposite direction from Richland reaches Columbus between 5:30 and 6:30 in the morning, passing Fort Benning Junction between 5:00 and 5:15 in the morning.

If we operated only one round trip in switching service in the morning between Fort Benning Junction and the Military Reservation we would protect our inbound loads to Fort Benning, both those coming from Richland and those which had been brought from Columbus that night to the Junction. However, the single trip per day would not take care of the traffic which appeared during the day, nor would it remove without delay the empty equipment that was released at the Fort during the day. The delay to this traffic would approximate 24 hours.

Recross-examination.

By Mr. Cunningham:

The business that could not be handled with the one trip per day service would consist of the cars that would arrive at our local house in Columbus during the day, which would not be carried to the Fort until the following morning. This traffic may be small, but it is worthy of consideration. Furthermore, we could not get the equipment that is released at the Fort during the day without a delay of 24 hours.

Testimony of E. S. GUBERNATOR

I am General Traffic Manager of the Lehigh Portland Cement Company, with headquarters at Allentown, Pennsylvania. Our interest in this case is that we have a cement mill at Birmingham, Alabama, and distribute cement gen- [fol. 163] erally through the South.

Early last winter we entered into contracts for approximately 20,000 barrels sold f.o.b. Fort Benning, Georgia, at which time the Fort Benning delivery rate was $5.00 per car over the Fort Benning Junction rate, and that is the amount that we are now paying to effect delivery. Part of the contracts have been shipped and part are yet to be shipped.

Cement generally loads about 114,000 pounds per car, producing a revenue of about $153.90 per car for some 200 miles of haul. We are opposed to any disposition of this case which will result in a greater transportation charge for making these deliveries.

Mr. Ribe, representing the Southern Cement Company, is unable to attend the hearing and asked me to represent him and state that they were opposed to any increase in the rate which would result from the cancellation of the Seaboard Air Line tariff.

By Director Bartel:

We do not willingly pay the $5.00 charge for getting our cement into the Fort, but we took this contract in contemplation of that charge and if it is increased to $12.50 we would be out $7.50 a car as compared with the present ar-

rangement. I think we ought to have the Junction rate into the Fort.

Cross-examination.

By Mr. Cunningham:

I do not know the date of our contracts, but it was during the time when the charge was $5.00 over the Junction rate. I do not know whether or not Page & Harris were operating the railroad at the time. When we entered into the contracts there was a charge of $5.00 to the contractor which we pay on all cars shipped by us. Our shipments did not begin to move until about February, although our contracts were made prior to that time. We naturally ship entirely by the Seaboard. It costs us $7.50 less than if we shipped by the Central of Georgia.

By Mr. Abeles:

As to any future contracts that we may make, if the Sea- [fol. 164] board tariff is cancelled the resulting increase in transportation charges would have to be borne by either the contractor and the Government or ourselves.

Testimony of E. L. Hart

I am Traffic Manager of the Atlanta Freight Bureau, an organization of the principal receivers of freight in the Atlanta Industrial District. I am also testifying in behalf of the Birmingham Traffic Association, a similar organization in Birmingham, Alabama, and for J. A. Jones Construction Company and Algernon Blair, contractors. We are not particularly interested in the controversy between the Central of Georgia and the Seaboard Air Line regarding this arrangement at Fort Benning, but our people are primarily concerned with the prospect of an advance in the present charges on carload traffic from the connection with the Central of Georgia and the Seaboard at Fort Benning Junction on deliveries in the Reservation at Fort Benning.

During the latter part of 1933 numerous contracts were entered into by producers in this section, particularly those for whom I am testifying. At that time Page & Harris

were operating the facilities between Fort Benning Junction and the deliveries within the Reservation, and we consulted with them as to the charges for their services. We were advised that the charge was $5.00 per gross car, and the contracts that our people made for the delivery of various types of building materials within the Fort Benning Reservation were predicated on that charge. We would certainly view with considerable alarm any change in that situation.

Later, in the early part of 1934, it developed that some change had been made in the charges that the contract operators of the Fort Benning track were making, and we received the document, dated January 3 (1934) which has already been placed in evidence. At that time, however, we were conversant with the fact that the Seaboard Air Line had filed certain tariffs effective (the preceding) December 4th whereby the Fort Benning Junction rate was made applicable to certain deliveries within the Reservation. Our interest lies primarily in the maintenance and continuance of this tariff which permits the deliveries to [fol. 165] be made in the Reservation at a cost no greater than $5.00 per gross car to our people.

By Director Bartel:

I am aware that the mere filing and acceptance of a tariff with the Commission does not necessarily mean that the Commission has approved it, but when the tariff is filed and not rejected it, of course, becomes a rate. It can be readily understood that should this tariff be found unlawful it means an additional cost of $7.50 per car on certain traffic on which the contracts have been based on $5.00 per car. To that extent we are vitally interested in any change in the existing situation.

Cross-examination.

By Mr. Cunningham:

Our contracts, so far as my knowledge goes, were all consummated prior to the end of 1933. When they were made we took the matter up with the operators of the track facilities in the Government Reservation and were advised that their charge was $5.00 per gross car, and that was the basis

we used in figuring our delivered price. So far as we know that was the charge at the time we closed our contracts.

By Director Bartel:

We knew nothing about the contract between Page & Harris and the War Department, but were merely advised that Page & Harris were operating the facilities and consulted with them as to what they would charge the contractors for delivering carload freight into the Reservation from Fort Benning Junction. We are advised that the charge was $5.00 and that was the basis on which the bids were made. The only question for us was what the charge would be from the Junction to the various delivery points in the Reservation. We did not know anything about the Seaboard tariff at the time the bids were closed.

Testimony of JOHN B. KEELER

I am Assistant General Manager of the Wood Preserving Corporation. Our position in this matter is very similar to that of the two preceding witnesses. We entered into contracts to deliver to the Reservation at Fort Benning, Georgia, three and a half million feet of lumber. These contracts were based on a charge of $5.00 per car over the Fort [fol. 166] Benning Junction rates, having been advised to that effect by the carriers serving Montgomery. We have a circular issued by the Seaboard Air Line dated May 19, 1933, stating that carload shipments moving to Fort Benning Junction under Government bills of lading are handled direct to Fort Benning without extra charge over the Fort Benning Junction rate, and that carload shipments moving under commercial bills of lading are subject to a switching charge of $5.00 per car over the Fort Benning Junction rate. A later circular dated October 30, 1933, announced a change with regard to less than carload shipments but none as to the handling of carload shipments. We made our bids according to this price and were successful in getting sales to the extent of three and a half million feet of lumber.

We have no interest in the controversy between the Seaboard Air Line and the Central of Georgia other than that if the existing arrangement is cancelled we shall lose to the extent of $7.50 per car on every car that moves in there. For that reason we hope that whatever disposition may be

made of this complaint will not compel us to pay $7.50 over and above the amount we figured on when we made our sales of this lumber. (At the request of Director Bartel it was agreed that copies of the Seaboard Air Line circulars referred to by the witness would be furnished for the record.)

Cross-examination.

By Mr. Cunningham:

I should say that roughly one-half of the three and a half million feet of lumber has been shipped.

Testimony of J. J. Bethune

I live in Birmingham, Alabama, and am Traffic Manager of the Alpha Portland Cement Company. Our situation is similar to that described by Mr. Gubernator of the Lehigh Cement Company. We have a cement mill at Phoenixville, Alabama, which serves the Southeast, and have two contracts at the present time on which there is a balance of [fol. 167] about 40% to be moved. This cement was sold on a delivered basis, and we object to any increase in the charges on deliveries which would require us to pay $7.50 per car extra.

By Director Bartel:

Our contracts were with contractors. They were entered into in April of this year (1934).

Testimony of E. C. Betts

The Secretary of War has directed me to attend this hearing as his representative to make a statement clarifying the War Department's interest in this proceeding. I have a letter from the Acting Secretary of War, Harry H. Woodring, dated June 8, 1934, addressed to Honorable Wm. E. Lee, Chairman of the Interstate Commerce Commission, which I introduce as Exhibit 44. This is merely a statement of the position of the Government insofar as it is represented by the War Department. The Secretary of War will have me say that the only respect in which we

are not satisfied with the present service rendered by Page & Harris is the fact that the Central of Georgia Railway is not qualified to render a similar service to that which is being rendered by the Seaboard Air Line. A considerable portion of the Government's freight moves on commercial bills of lading. This freight moves into the Fort without additional cost to the Government if transported over the Seaboard Air Line, whereas the Central of Georgia does not consider itself qualified under Section 22 (of the Interstate Commerce Act) to give the Government free service on their freight that does not move on a Government bill of lading. I do not know whether the Government has agreed that the Central of Georgia is correct in its position, but I do know that we recognize the fact that you do not do it.

So far as the Seaboard Air Line traffic goes on shipments to the United States Government on Government bills of lading no extra charge is made against the Government over and above the Junction rate. On shipments moving on commercial bills of lading, where the freight charge is not paid by the Government the shipper pays the freight. [fol. 168] If a commercial bill of lading shipment on which the freight charge has been prepaid by the shipper is consigned to the Government Page & Harris bring it in without extra cost to the Government, and I assume that the Seaboard pays Page & Harris under this tariff. On similar shipments moving in over the Central of Georgia that line does not pay Page & Harris, and on that traffic the Government pays Page & Harris $5.00 under its contract with them.

The Secretary of War understands that it is neither the intention nor the desire of the Commission to assume jurisdiction to review or revise the War Department's relation with Page & Harris. By that remark I am referring to the prayer in the complaint which petitions the Commission to review the relation between the War Department and Page & Harris. The Secretary of War understands that, as the constitutional representative of the Executive Department, his functions are not subject to review in proceedings of this sort.

The Secretary of War regards the present arrangement as furnishing the best railroad transportation which may be enjoyed at Fort Benning in view of the Commission's decision in Docket 9709 that it was a switching service.

By Director Bartel:

The War Department objects to (the trunk line) railroads' performing the service instead of employing Page & Harris because its experience over a number of years, and throughout a rather large territory, has demonstrated that transportation facilities remotely controlled are not as responsive to the needs of the Government, the Military Branch of the Government, as a transportation immediately controlled.

I don't believe that I can state whether the War Department would permit Page & Harris to sublet its contract to perform service within the Fort if it so desired, but I can present for your consideration a letter from the Secretary of War approving a proposal to modify the present contract so as to allow such subletting subject to the approval of the Commandant at Fort Benning. This contemplates the rendition of the switching service from Fort Benning [fol. 169] Junction to the receiving and delivery track at Fort Benning proper, but not the intra-plant service within the Reservation.

With reference to the responsibility of the War Department to page Page & Harris under its contract $5.00 for all cars brought out to the Fort, the contract, of course, speaks for itself, but manifestly the War Department could not lawfully assume an obligation to transport freight for other people. It could not undertake to transport freight for someone else because that would constitute expending appropriated public funds without benefit to the Government.

With reference to the Director's inquiry about the War Department's service, I can say, with the authority of the Secretary of War, that in his judgment independent operation of this road is superior and more advantageous to the Government than any other form of operation.

With reference to Mr. Cunningham's charge that certain officials in the War Department have connived with the Seaboard Air Line, I am sorry that he has such a poor regard for us as to entertain that view. This contract has been regarded as sufficiently advantageous to the Government to be repeated by a second administration. It was originally negotiated by Secretary of War Hurley's administration and later renewed by Secretary Dern's administration.

Finally, I should like to suggest, with reference to the right of Page & Harris under this contract to make a charge for their services, wholly aside from the fact that the War Department would not permit them to render services to shippers at its expense, that their contract is not dissimilar to that which the Central of Georgia had, under which they made charges by way of arbitraries to shippers and contractors other than the Government in performing similar freight movements from Fort Benning Junction to Fort Benning. (Mr. Cunningham thereupon stated that the Central of Georgia's contract was wholly dissimilar and objected to all statements made by the witness which were communications to him from someone else on the ground that they were hearsay. The Director ruled that his objection would be given consideration when the report was written.)

[fol. 170] By Mr. Cocke:

I do know the attitude of the War Department towards any operation of the railroad facilities within the Reservation itself by any other agency than Page & Harris under the control of and under a private arrangement with the Government. I am referring now to the services within the Reservation beyond the receiving and delivery tracks. This service the War Department regards as unsatisfactory if rendered by any agency not immediately and locally responsive to and under the entire control of the Department. It is this service for which the Government now pays Page & Harris $1,000.00 a month. This means that under any circumstances, and regardless of who operated the facilities up to the delivery tracks in the Reservation the Government would not permit the Seaboard Air Line, the Central of Georgia or anyone else to do that detailed switching within the limits of the Fort. They prefer their own agency to do that and do not want any common carrier operation from the receiving and delivery track. The present arrangements with Page & Harris are entirely satisfactory to the War Department.

If the Central of Georgia or the Seaboard Air Line were permitted to operate the tracks up to the delivery track certain intra-plant switching facilities would be required to render the service that is now being rendered by Page & Harris for $1,000.00 per month. Prior to the termination of

the relations with the Central of Georgia in October, 1932, in order to supplement the initial placement made by them the Government maintained its own switching crew, and an additional complement of engineers, firemen and brakemen, and operated its own engine in rendering itself the service which is now being rendered by Page & Harris. Normally one crew sufficed for this service, but to make it sufficiently elastic to meet military needs we had to have an alternate crew who were civil service employees and had to stand examinations, etc., which was a rather cumbersome undertaking. I do not know whether Page & Harris, who now perform this service, maintain two or three crews, but I do know that they have been frequently required to render almost continuous 24-hour service in connection with the C. C. C. concentration for as much as 90 days at a time.

[fol. 171] Cross-examination.

By Mr. Cunningham:

I am not in the traffic department or the operating department of the Government. I am entirely in the law department. I do not know that when the Central of Georgia operated at Fort Benning it delivered all of the contractors' freight and spotted the cars. I heard it testified here this morning. It might have been true that during the time the Central of Georgia operated the Fort Benning Line it had only one engine and crew and did all the work. The tremendous amount of service that has to be performed by the parties who operate the Fort Benning Railroad is not necessarily due to the unusual construction program now in progress at Fort Benning but to the military exigencies that cannot be anticipated but must be provided for. Before the large construction began Page & Harris have been required to make as many deliveries to the Junction as the spotting of freight by the common carriers at the Junction necessitated.

I understand that sometimes Page & Harris' crew knock off at 4:00 o'clock if there is nothing to do, and I also understand that they stay until 7:00 if there is something to do. In a case of military necessity Page & Harris would not furnish the required cars because they do not own cars. I understand that the engine used by Page & Harris cannot

take more than 3 or 4 cars at a time from Fort Benning Junction to the Fort, but I do not know whether, in the event of a considerable troop movement they could not carry them to the main line of the railroad. I do know that when several years ago the Central of Georgia was operating the track I had to walk from the bridge up into the Post every time it rained because the Central of Georgia could not get its passenger train up the hill.

I shall let you have the current operating contract and, if by any chance, there has been a modification of the lease, I will furnish you that.

[fol. 172] By Mr. Hitt:

The charges made by Page & Harris to contractors who receive intra-Reservation service had had the approval of the War Department. It is my recollection that this approval is in writing, and if I am correct I will try to produce it.

In recent months a maximum of close to 30,000 men have been handled in the C. C. C. movements. I know of no delays that have been encountered in the handling of those men or in the materials and supplies for them, but that is not within my personal knowledge.

By Mr. Cocke:

From the knowledge that I have gained in conferences that I have attended I know of no criticism of any of the services rendered by Page & Harris even when the maximum movement of 30,000 men per month was at its peak. (Then followed a discussion between counsel with reference to the $5.00 charge made to contractors by Page & Harris as a temporary contribution towards the expense of the service from the Junction point until the common carrier railroad was established, Mr. Hitt explaining that he made reference to this to clear up an apparent misapprehension as to the nature and purpose of this charge on the part of Mr. Cunningham. Director Bartel stated that the record in Finance Docket 9709 would speak for itself with respect to this matter and that the record in the old proceeding is a part of this record. Mr. Hitt then stated that he wished to question Mr. Page further on this point.)

Testimony of H. A. Page, Jr. (Recalled)

By Mr. Hitt:

The Government paid Page & Harris $5.00 only on shipments that came to the Government at Fort Benning on commercial bills of lading or on Government bills of lading. It did not make this payment on any shipments which came to contractors. As to such shipments we made a charge (against the contractors) of $5.00. This was not intended as a compensatory charge but merely as a temporary arrangement in effect pending the issuance of the certificate from the Interstate Commerce Commission [fol. 173] which was finally denied.

Cross-examination.

By Mr. Cunningham:

I think that I received written authority from the War Department to collect $5.00 from any contractor for spotting cars at Fort Benning. That, I believe, is the paper that Captain Betts said he would furnish. (Captain Betts then stated he had found the letter and it was presented to the witness to read). I did not say that this document, signed by General E. H. Estes, Brigadier General, Commandant, and bearing an approval and endorsement by other officers, was an amendment of our contract. I only said that it gave us the right to charge contractors $5.00.

We charge the contractors $5.00 a car and also charge the Government $1,000.00 per month. If I remember correctly a survey was made of the cost to the Government of intra-plant service for a number of cars that came into the Reservation on commercial and Government bills of lading and it averaged about $9.00 per car in addition to the $5.00 charge between Fort Benning Junction and the receiving tracks. The point was made that it was not fair to the Government that it should pay a total of $14.00 a car for the placement of these cars when the contractors got theirs to final placement for $5.00.

General Estes concludes his endorsement with this statement:

"In view of the above, it is recommended that sympathetic consideration be given to the announced intention

of the Fort Benning Railroad to make such a charge, and to take such measures for relief as may be legal and just."

This was satisfactory authority to me to impose the charge.

(The letter and endorsements referred to in the witness's testimony were then received as Exhibit 45.)

The original intention, as I understand it, was that the Government should pay $5.00 per car on all cars coming into the Reservation. During the first six months little contractors' business moved. When it began to move the attitude of the Quartermaster's Department was that the Government was under no obligation to pay the $5.00 on [fol. 174] shipments to contractors, so we were forced to collect the $5.00 from the contractors. Until this letter that we wrote to the Quartermaster General and the endorsement that Mr. Cunningham has just seen we made no greater charge than the nominal $5.00 that the Government was contributing for that service.

We have no great investment in the track or station at this point.

By Director Bartel:

We maintain the track entirely. We act as agent for the Seaboard Air Line between Fort Benning Junction and Fort Benning. It costs us between $6,000 and $7,000 a year to maintain the track. We do not bill the Seaboard for this cost, the only amount that we received from the Seaboard being the $12.50 per car, and where the Seaboard's revenue is less than $25.00, one-half of whatever their actual revenue is. (Thereupon the hearing was closed.)

RECITAL AS TO OMISSION OF CERTAIN EXHIBITS

All of the Exhibits introduced in evidence before the Interstate Commerce Commission in Docket No. 26483, Nos. 1 to 47, inclusive, are here copied with the exception of Exhibits Nos. 29, 30, 31, 32, 33 and 41 which are omitted for the reasons hereinbelow stated.

Exhibit No. 29:—this exhibit, which is a switching tariff of the Receivers of the Seaboard Air Line, is attached as Exhibit 2 to the bill of complaint in this cause and is ad-

mitted to be there correctly set forth. It is, therefore, agreed that it need not be copied here.

Exhibit No. 30:—the substance of this Exhibit, which is the Sixth Section Application of the Receiver of Central of Georgia Railway Company dated February 9, 1934, for authority to file on one day's notice a tariff similar to the switching tariff of the Receivers of the Seaboard Air Line, has been stated in the testimony and the parties have agreed that it need not be copied here.

[fol. 175] Exhibit No. 31:—the substance of this Exhibit, which is the Order of the Interstate Commerce Commission denying the Sixth Section Application of the Receiver of Central of Georgia Railway Company, has been stated in the testimony and the parties have agreed that it need not be copied here.

Exhibit No. 32:—this Exhibit comprises a list of tariffs publishing rates to and from Fort Benning in effect October 17, 1932, which were cancelled upon discontinuance of operation of the Fort Benning track by Central of Georgia Railway Company. The substance of the Exhibit has been stated in the testimony and the parties have agreed that it need not be copied here.

Exhibit No. 33:—this Exhibit is a list of representative tariffs publishing rates to and from Fort Benning Junction, Georgia, now in effect, and the parties have agreed that it is of no substantial importance to the issues of this cause and need not be copied here.

Exhibit No. 41:—this Exhibit, which is the agreement dated June 7, 1934, between the Receivers of the Seaboard Air Line and H. A. Page, Jr., and C. F. Harris, under which Page and Harris act as agents of the Receivers of the Seaboard is transporting freight between Fort Benning Junction and Fort Benning, is attached as Exhibit No. 3 to the bill of complaint in this cause and is admitted to be there correctly set forth. The parties have therefore agreed that it need not be copied here.

EXHIBIT 1

Docket 26483

War Department,

Office of the Quartermaster General, Washington

QM 531.4 T-R.
Central of Georgia

January 15, 1934.

Mr. Allan Browning, Commercial Agent, Central of Georgia Railroad, 520 Commercial Trust Building, Philadelphia, Pennsylvania.

DEAR SIR:

With reference to communication from this office dated [fol. 176] January 4, 1934, under the above file reference, covering movement of 40 Government-owned tank cars from Fort Benning Junction, to be shipped to the Standard Oil Company, Baton Rouge, Louisiana, routed Central of Georgia to Birmingham, Southern Railway to Hattiesburg, Mississippi. Central to Brook Haven and Illinois Central System to Baton Rouge, it is advised in this connection that the routing in question has been cancelled due to the fact that the Seaboard Air Line has issued a tariff absorbing the switching charge between Fort Benning Junction and Fort Benning proper.

In view of the above it will be necessary in order for the Central of Georgia to participate in the business destined Fort Benning Georgia, to issue a tariff absorbing the switching charge between Fort Benning Junction and Fort Benning proper.

Advise this office action taken at your earliest convenience.

For the Quartermaster General:

R. E. Shannon, Captain, Q. M. C., Assistant.

EXHIBIT No. 2

Docket 26483

War Department,

Office of the Quartermaster General, Washington

February 2, 1934.

In Reply Refer to QM 554.4 T-R (Central of Ga. R. R.)

General Freight Agent, Central of Georgia, Savannah, Georgia.

DEAR SIR:

Under current freight tariff publication the Seaboard Air Line Railway provides for the absorption of the switching charges of the Fort Benning Railroad between Fort Benning Junction, Georgia, and the warehouses or other delivery points at the Ft. Benning Army Post.

The Central of Georgia Railroad has no similar arrangement within the knowledge of this office. It will accordingly be necessary to issue instructions to route all freight [fol. 177] originating at or destined to Ft. Benning via the Seaboard Air Line Railway in order to secure the benefit of the absorption, unless the Central has a similar absorption rule or will immediately put one into effect, either by tariff publication or by agreement filed with this office which may be done under authority section 22 of the Interstate Commerce Act.

Please advise as early as possible your pleasure in the matter. Promulgation of routing instructions will be withheld for a few days pending receipt of reply hereto.

For the Quartermaster General:

Very truly yours, (S.) R. E. Shannon, Captain, Q. M. C., Assistant.

EXHIBIT No. 3

Docket 26483

Western Union

Savannah, Ga., February 9, 1934.e

R. E. Shannon, Captain, Q. M. C., Assistant, War Department, Washington, D. C.:

Yours second. Under Section twenty-two of Interstate Commerce Act, Central of Georgia Railway hereby agrees with War Department to absorb out of its revenue on Government freight switching charges made by Page and Harris, contractors operating Fort Benning Railroad, between Fort Benning Junction, Ga. and the Fort Benning Army Post, as absorbed by Seaboard Air Line Railway.

C. D. Chancellor, General Freight Agent, Central of Georgia Railway. 11:10 A. M.

Frank 3713.
File 367/16-B.

[fol. 178] EXHIBIT No. 4

Docket 26483

February 9, 1934. e

367/16-B

Captain R. E. Shannon,
Q. M. C., Assistant, War Department, Washington, D. C.

DEAR SIR:

Yours February second, QM 554.4 T-R (Central of Ga. R. R.).

This confirms my telegram of this date reading:

"Yours second. Under Section 22 of Interstate Commerce Act, Central of Georgia Railway hereby agrees with War Department to absorb out of its revenue on Government freight switching charges made by Page and Harris, contractors operating Fort Benning Railroad, between Fort Benning Junction, Ga. and the Fort Benning Army Post, as absorbed by Seaboard Air Line Railway."

If acceptable, we will operate the arrangement as best suits the War Department, i. e., by deducting switching charges made by Messrs. Page and Harris from our charges on traffic moving on Government bills of lading or by paying Messrs. Page and Harris for their services.

Please let me know your wishes.

Yours very truly, (Sd.) C. D. Chancellor, General Freight Agent.

Exhibit No. 5

Docket 26483

Postal Telegraph

AG90 45 DL GOVT 3 EXTRA—WASHINGTON DC VIA FTMCPHERSON GA 14

C D CHANCELLOR, GENL FREIGHT AGENT— 1216P

CENTRAL OF GEORGIA SAVANNAH GA—

1934 FEB 14 PM 1 33

YOURS FEBRUARY NINTH NOTE WITH SATISFACTION CENTRAL OF GEORGIA AGREES TO EFFECT DELIVERY AT FORTBENNING ON FORTBENNING JUNCTION RATES ON SAME BASIS AS SEABOARD AIR LINE RAILWAY WILL THIS BE EFFECTIVE SAME DATE AS SEABOARD NAMELY DECEMBER FOURTH NINETEEN HUNDRED THIRTY THREE—

WILLIAMS ACTING QM GENERAL.

[fol. 179]

Exhibit No. 6

Docket 26483

Western Union

367/16-A

11:45 AM.

Savannah, Ga., February 17th, 1934.

Brig. General Alexander E. Williams, Acting Q. M. General, U. S. Army, Washington, D. C.

Yours February fourteenth. Under authority given us Section Twenty two, Interstate Commerce Act, Central of

Georgia agrees with War Department to absorb out of its revenue on freight moving under Government bills of lading switching charge of Page and Harris for handling Government freight between Fort Benning Junction and the Fort Benning Army Post to the same extend as Seaboard Air Line Railway absorbs these charges and effective the same date as Seaboard began absorbing these charges, which I understand to be December fourth, nineteenth thirty three. Will have to rely on you to advise us amount per car the Seaboard absorbs.

C. D. Chancellor.

CAK 3713.
100 Words.

EXHIBIT No. 7

Docket 26483

Western Union

1934 FEB 19 PM 5 12

VH58 49 3 EXTRA DL GOVT-WASHINGTON DC VIA FORTMCPHERSON
GA 19
C D CHANCELLOR, GENERAL FREIGHT AGENT—CENTRAL OF GA RAILWAY—

YOURS SEVENTEENTH THIS OFFICE HAS NO KNOWLEDGE AS TO LOCAL SWITCHING ARRANGEMENTS FORTBENNING BETWEEN SEABOARD AND PAGE AND HARRIS OR AMOUNT PAID BY FORMER TO LATTER FOR THIS SERVICE ASSUMED FROM YOUR TELEGRAM NINTH YOU HAD COMPLETED ARRANGEMENTS FOR SWITCHING BETWEEN FORT BENNING JUNCTION AND FORT BENNING ADVISE—

WILLIAMS ACTING QM GENERAL.

[fol. 180]

EXHIBIT No. 8

Docket 26483

Western Union

367/16-A

9:00 A.M.

Savannah, Ga., February 20th, 1934-G.

Brig. General Alexander E. Williams, Acting Q.M. General, U. S. Army, Washington, D. C.

Yours nineteenth. Understand War Department has contract with Page and Harris for handling all Government freight between Fortbenning Junction and Army Post, and we are authorizing War Department deduct whatever charge is made by Page and Harris for handling Government freight between Fortbenning Junction and Army Post when making settlements with Central on Government freight we handle to and from Fortbenning Junction, so that the Government will pay no greater charges on its freight when handled by Central than when handled by Seaboard.

C. D. Chancellor.

CAK 3713.
83 words.

EXHIBIT No. 9

Docket 26483

Western Union

Savannah, Ga., February 20, 1934.

General Alexander E. Williams, Acting Quartermaster General, Washington, D. C.

Page and Harris demanding that we pay them twelve dollars and a half per carload on all Government freight handled by them from Fort Benning Junction to Fort Benning STOP Our bills lading on all Government freight

read to Fort Benning Junction and we have no obligation to carry beyond the junction STOP We said to you that we would hold Government harmless on all costs paid by it to Page and Harris for their services under contract with Government which we understand is Five dollars per car STOP Page and Harris refuse to handle beyond Junction unless we pay them twelve dollars and a half and we will continue to deliver freight at Junction and save Govern-
[fol. 181] ment harmless on anything it has been paying to Page and Harris STOP Will you please instruct Page and Harris to take Government freight from us at Fort Benning Junction on these terms.

H. D. Pollard, Receiver.

EXHIBIT No. 10

Docket 26483

Postal Telegraph

AG116 69 DL GOVT 3 EXTRA-WASHINGTON DC VIA PFO FTMCPHERSON GA

C D CHANCELLOR, GENERAL FREIGHT AGENT— 21 134P

CENTRAL OF GA RR SAVANNAH GA— 1934 FEB 21 PM 2 56

YOURS TWENTIETH NOT SATISFACTORY SWITCHING ARRANGEMENTS FTBENNING JUNCTION BETWEEN WAR DEPT AND PAGE AND HARRIS TEMPORARY ONLY IN EXPECTATION THEY WOULD BE MADE COMMON CARRIER IF YOU DESIRE TO HANDLE SHIPMENTS FOR FTBENNING INCUM-ENT ON YOU TO ARRANGE WITH PRESENT CONTRACTORS FOR THIS SWITCHING AND NOT WITH WAR DEPARTMENT THIS IS THE ACTION TAKEN BY SEABOARD AND DO NOT SEE WHY YOU CANNOT MAKE SIMILAR ARRANGEMENTS—

WILLIAMS ACTING.

EXHIBIT No. 11

Docket 26483

File—367/16-F.
4:37 PM.

Western Union Telegram

CAK,FRANK NO. 3713.

Savannah, Ga., February 21, 1934-flm.

Brig. General Alexander E. Williams, Acting Q. M. General, U. S. Army, Washington, D. C.

Yours date Have now advised Page and Harris would allow them for handling all Government freight between Fort Benning Junction and Army Post the same amount allowed them by Seaboard.

C. D. Chancellor.

[fol. 182] EXHIBIT No. 12

Docket 26483

Western Union

9:45 A Savannah Ga February 23 1934.

General Alexander E. Williams, Acting Quartermaster General, Washington, D. C.:

On Wednesday February twenty-first Central of Georgia Railway reached definite agreement with Page and Harris for handling Government freight on same basis as they handle such freight routed via Seaboard Air Line will appreciate your acknowledgment of this information and also your action in advising all concerned that such agreement has been reached

H. D. Pollard.

CAK 13813.

EXHIBIT No. 13

Docket 26483

Postal Telegraph

AG172 60 3 EXTRA NL GOVT-WASHINGTON DC VIA PFO FTMCPHERSON GA 23

1934 Feb 23 PM 10 18.

C D CHANCELLOR—

GEN FGT ACT CENTRAL OF GA RR SAVANNAH GA—

YOURS TWENTY FIRST IT IS UNDERSTOOD BILLS OF LADING FOR SHIPMENTS TO FTBENNING VIA YOUR LINE WILL READ TO FTBENNING JUNCTION COMMA THAT YOU WILL PAY THE CONTRACTORS FOR SWITCHING TO RECEIVING AND DELIVERING TRACKS AT FTBENNING AND THAT THIS IS EFFECTIVE SAME DATE AS SEABOARD TARIFF VIZ DECEMBER FOURTH NINETEEN THIRTY THREE IS THIS CORRECT UNDERSTANDING—

WILLIAMS ACTING.

[fol. 183] EXHIBIT No. 14

Docket 26483

File 367/16-F.
10:45 AM.

Western Union Telegram

CAK FRANK NO. 3713.

Savannah, Ga., February 24, 1934-flm.

Brig. General Alexander E. Williams, Acting Q. M. General, U. S. Army, Washington, D. C.:

Yours twenty-third. Your understanding is correct as follows Bills of lading for shipments to Fort Benning via Central of Georgia will read to Fort Benning Junction

comma Central of Georgia will pay the contractors for switching Government freight from receiving tracks and to delivering tracks at Fort Benning and this is effective same date as Seaboard tariff namely December fourth nineteen thirty-three Stop We have agreed with Page and Harris that they will accept from us five dollars per car now due or already paid by the finance office and that they will refund to the War Department any amounts collected by them on Government shipments moving over the Central of Georgia originating or delivered at Fort Benning since December fourth nineteen thirty-three.

C. D. Chancellor.

EXHIBIT No. 15.

Docket 26483

Western Union

1934 Feb 26 PM 144.

VH 29 21 GOVT 3 EXTRA-WASHINGTON DC VIA FORTMCPHERSON GA. 26.

C. D. CHANCELLOR—
GENERAL FREIGHT AGENT CENTRAL OF GA RAILWAY—

YOURS TWENTY FOURTH RE SWITCHING FORT BENNING JUNCTION ARRANGEMENTS SATISFACTORY AND IS ACCEPTED ALL CONCERNED WILL BE NOTIFIED ACCORDINGLY—

WILLIAMS ACTING QM GENL.

[fol. 184] EXHIBIT No. 16

Docket 26483

Western Union

1934 FEB 26 PM 1 51.

VH30 42 GOVT 3 EXTRA-WASHINGTON DC VIA FORTMCPHERSON GA 26

H D POLLARD—
RECEIVER CENTRAL OF GEORGIA RAILWAY—

YOURS TWENTY THIRD ACKNOWLEDGED ALL CONCERNED ARE BEING ADVISED THAT GOVERNMENT FREIGHT FOR FORTBENNING CAN BE ROUTED VIA EITHER CENTRAL OF GEORGIA OR SEABOARD AIR LINE AT SAME COST TO GOVERNMENT SUBJECT OF COURSE TO RESTRICTIONS IN COMMERCIAL TARIFFS—

WILLIAMS ACTING QM GENERAL.

EXHIBIT No. 17

Docket 26483

Postal Telegraph

AG142 70 GOVT NL 3 EXTRA-WASHINGTON DC VIA FTMCPHERSON GA 20

C D CHANCELLOR, GENL FREIGHT AGENT—
CENTRAL OF GA RR SAVANNAH GA—

1934 MAR 20 PM 7 58.

COMMANDING GENERAL FORTBENNING WIRES UNDERSTAND YOU REFUSE TO PAY PAGE AND HARRIS FOR SWITCHING CARS CONSIGNED TO QM ON COMMERCIAL BLADING YOUR TELEGRAM FEBRUARY TWENTYFOURTH AGREED TO PAY SWITCHING BETWEEN FORTBENNING JUNCTION AND FORT BENNING ON GOVT FREIGHT WHILE THIS ORDINARILY MOVES ON GOVT BLADINGS

THERE WILL BE SOME CASES WHERE SHIPMENTS MOVE ON COMMERCIAL BLADING WHICH ARE LATER CONVERTED TO GOVT AND YOU SHOULD PROTECT ADVISE

GUINEY.

[fol. 185]

EXHIBIT No. 18

Docket 26483

367/16 A

2:55 PM.

Savannah, Ga., March 21st, 1934. g.

Colonel Patrick C. Guiney, Q. M. Corps, U. S. Army, Washington, D. C.

Yours twentieth. Our understanding Federal laws is we cannot pay any sums of money for handling freight beyond our line Forbenning Junction, Georgia, to the Army Post other than on Government freight as provided for in Section Twenty-two of Act to Regulate Commerce. Our further understanding is that Government freight is that freight which is covered by Government bills of lading or where the Government makes settlement direct with the railroads for freight charges. If there are any shipments consigned to United States Army Fortbenning Junction Georgia on commercial bills of lading on which the War Department, or any other Governmental Agency, will make settlement of freight charges direct with Central .e will pay switching costs for handling such cars between Fortbenning Junction and Fortbenning.

C. D. Chancellor

EXHIBIT No. 19

Docket 26483

Columbus, Mar 22— 1934.

Pollard, Cummins, Knapp, Daniel, Savannah:

I received today following letter from R B Lovett, Captain, Infantry, assistant Adjutant, dated FtBenning Ga

March 22nd, 1924, showing copy to QM General, Washington DC and Quartermaster, Ft Benning Ga Quote: The Commandant directs that the Central of Georgia Railway be advised it is expected that the Central of Georgia Railway will complete the delivery of all freight consigned to the Government and or its agencies at Ft Benning Ga whether moving on Government bills of lading or domestic (Sl. 136, Commercial) bills of lading. This without further delay as regards all such freight now in its possession as well as all such freight coming into its possession. Any failure on the part of the Central of Georgia Railway to complete the delivery of any such freight will be noted and appropriate action taken to safeguard the interests of the Government in the premises. Unquote

(Redacted) Jones

Exhibit No. 26

Docket 26482

Central of Georgia Railway

H. D. Pollard, Receiver

Columbus, Ga., March 22, 1924

File 375-14-3

R. B. Langille, Captain, Infantry, Assistant Adjutant, Fort Benning, Georgia.

Dear Sir:

Replying to your letter March 22

The Central of Georgia Railway has or will deliver to the Fort Benning Railroad at Fort Benning Junction, Ga., and pay switching costs for handling from Fort Benning Junction to Fort Benning all freight which is the property of the United States Government at the time it is in our possession; or in other words, freight moving on Government bills of lading, or when moving on commercial bills of lading when settlement of freight charges is made direct by the United States Government with the Central of Georgia Railway.

We can not, under the Federal Laws, pay any sums of money for handling freight beyond our Railway at Fort Benning Junction, Ga., to the Army Post at Fort Benning on other than Government freight as provided for in Section 22 of Act to Regulate Commerce.

Yours very truly, , Superintendent.

Cy: QM General, Washington, D. C. Quartermaster, Ft. Benning, Ga.

Blind Cy: Mr. Pollard.

[fol. 187] Mr. Cummins.

Mr. Knapp In accordance with your wire date

Mr. Daniel.

Cy: Mr. Cummins Columbus.

Exhibit No. 21

Docket 26483

Fort Benning, Ga., April 9, 1934.

Central of Georgia Railway, Columbus, Ga.

Attention Mr. Tom Wade, Division Freight Agent

Dear Sir:

You are hereby advised that the Fort Benning Railroad (Page & Harris Government Contractors) have been instructed to receive from the Central of Georgia Railway at Fort Benning Junction, hence forward and until further notice, all freight purchased f.o.b. Fort Benning Junction and moving on commercial bills of lading, consigned to the Government or its Agencies at Fort Benning Junction, and to transport same to Fort Benning proper at the expense and for account of the Government.

Yours very truly, (S.) J. DeCamp Hall, Colonel Q.M.C., Quartermaster.

EXHIBIT No. 22

Docket 26483

Fort Benning, Ga., October 13, 1922.

Agent, Central of Georgia Railway, Columbus, Georgia
Agent, Receivers of Seaboard Air Line Railway, Columbus, Georgia

Dear Sirs:

The railroad line and properties owned by the United States located within the Government Reservation and extending between the Fort Benning stations and Fort Benning Junction, Georgia, have been leased to H. A. Page, Jr. and C. F. Harris, who will, under the arrangement obtaining between them and the Government, operate the line of railroad until further notice strictly as a private car- (Fol. 188) rier, serving only the Government. As such private carrier, they will handle traffic for the Government from points in the Reservation to the point where the Government's line connects with the lines of your railroads.

Until such time as the Interstate Commerce Commission may issue a Certificate of Public Convenience and Necessity and a corporation, now in contemplation, to be known as Fort Benning Railroad Company, has been organized, the undersigned will merely act as a private or contract carrier and will not handle any joint traffic in connection with your lines. It will, therefore, be necessary in connection with all traffic handled by you to and from Fort Benning Junction, to issue bills-of-lading and collect freight charges as from that point. Under our arrangement with the Government, the undersigned will handle for account of the Government, the traffic between the junction point and points in the Reservation.

We are advised that all through rates to Fort Benning which were in effect via Central of Georgia Railway have been cancelled and, under the circumstances outlined and as stated above, we can not handle traffic except as indicated herein.

H. A. Page, Jr., C. F. Harris, Doing Business as Fort Benning Railroad.

Copies to: Mr. C. R. Capps, CTO, SAL Ry., Norfolk, Va.
Mr. W. McN. Knapp, TM, CofGa, Savannah, Ga.

Exhibit No. 23

Docket 26483

H. A. Page, Jr. C. F. Harris.

Page & Harris

Private Contract Operators of Fort Benning Government Railroad

Notice

(The Government railroad in the Fort Benning Military Reservation is not a common carrier and Page & Harris operate it entirely as private contractors in individual relation to each Government Contractor they may agree to [fol. 189] serve, hence their liability is only that of non-common carrier private contractors.)

Memo as Basis for a Contract

Fort Benning, Ga., January 3, 1934. (R)

To all concerned:

The private railroad operated by Page & Harris does not, and will not, serve the general public, and only holds itself out to serve the needs of the Government in the Fort Benning Military Reservation, which however includes those who have contracts with or for the benefit of the Government, and with whom Page & Harris will contract for service only as a private carrier.

For the benefit of contractors and/or prospective contractors for Government work in the Fort Benning Military Reservation the probable basis of charge (subject to specific agreement when the occasion actually arises) for private service to them by Page & Harris will be as follows:

For movement of an entire car and its contents and return of the empty car—

(1) Between Fort Benning Junction and any related spotting location in the Fort Benning Military Reservation which may be available, and on which the common carrier service of the Central of Georgia has ended or has not begun $12.50 per car.

(2) Between the point designated as the "Receiving and Delivery Tracks" at the Fort Benning Military Post and any selected spotting location which may be available, and on which the common carrier service of the Seaboard Air Line Railway has ended or has not begun $5.00 per car with contents of 10,000 lbs. or over.

(3) Less car lots of under 10,000 lbs. on which common carrier service has ended or has not begun, 12½ cents per hundred pounds, with a minimum charge of 25 cents for any one lot.

(fol. 190) EXHIBIT No. 24

Docket 26483

H. A. Page, Jr. C. F. Harris.

Page & Harris

Contract Operators of Fort Benning Railroad, Fort Benning, Ga.

February 5, 1934.

Mr. H. D. Pollard, Receiver, Central of Georgia Railway, Savannah, Ga.

DEAR SIR:

Your attention is invited to Seaboard Air Line Railway Tariff Sixth Revised Page 139, I. C. C. No. A-6826, effective December 4, 1933.

Please be advised of the willingness of Page & Harris, as private contract operators of the government owned railroad at Fort Benning and to Fort Benning Junction (Georgia), to perform the same contract transportation service, and on the same basis, for the Central of Georgia Railway, covering all shipments of freight to and from your railroad at Fort Benning Junction, as is now being rendered by Page & Harris as such private contract operators performing like service for the Seaboard Air Line Railway at Fort Benning Junction.

In furtherance of the consummation of the necessary private contractural arrangements for the rendition of such

service, we will be pleased to confer with your representative at a time and place to be designated by you.

Very truly yours, Page & Harris, by (S.) H. A. Page, Jr. (As Private Contract Operators).

[fol. 191] EXHIBIT No. 25

Docket 26483

H. A. Page, Jr. C. F. Harris.

Page & Harris

Contract Operators of Fort Benning Railroad, Fort Benning, Ga.

February 20, 1934.

Mr. H. D. Pollard, Receiver, Central of Georgia Railway, Savannah, Georgia.

DEAR SIR:

Through Mr. T. P. Wade, District Freight Agent, Central of Georgia Railway, Columbus, Georgia

Reference our conversations, of recent date, with various representatives of the Central of Georgia Railway concerning our proposal to handle shipments of freight consigned to the government or any of its agencies or instrumentalities, from Fort Benning Junction to Fort Benning, please be advised: In view of the Information, at hand, that the Central of Georgia Railway does not desire to contract with us to so handle such shipments of freight, you are advised that effective at once no such shipments will be so handled by us and that further use by the Central of Georgia Railway (for such shipments of freight), of the interchange track at Fort Benning Junction or any other trackage facilities under lease to us from the government is prohibited.

A copy hereof is being furnished The Quartermaster General at Washington, D. C., and The Commandant at Fort Benning, Georgia.

Very truly yours, Page & Harris, by (Sgd.) H. A. Page, Jr.

Copies to: Quartermaster, Ft. Benning, Ga. Mr. Claude Baldwin, Supt., Cen. of Ga. R. R.

(The Government railroad in the Fort Benning Military Reservation is not a common carrier and Page & Harris operate it entirely as private contractors in individual relation to each Government contractor they may agree to serve, hence their liability is only that of non-common carrier private contractors.)

[fol. 192] EXHIBIT No. 26

Docket 26483

Columbus, Ga., February 21, 1934.

Mr. C. F. Harris, Fort Benning Railroad, Fort Benning, Ga.

DEAR SIR:

Referring to telephone conversation today in regard to handling shipments from Central of Georgia Railway to Quartermaster or other Governmental agencies at Fort Benning:

The Central of Georgia Railway is agreeable to your handling these shipments under the terms and conditions as outlined in memorandum received from you a few days ago and which is quoted below:

"Agreement acceptable to Page & Harris covering shipments to Quartermaster or other governmental agencies at Fort Benning when received at the interchange track at Fort Benning Junction in connection with the Central of Georgia Railroad:

1. Central of Georgia to pay $12.50 for each car handled, with no charge for return of empty car.

2. Where revenues of the Central of Georgia on any car is less than $25.00, Central to pay one-half of its revenue on that car for handling.

3. Page and Harris will, if desired, and without additional charge, act as agent of the Central of Georgia Railroad, billing all outgoing shipments, and collecting, taking proper receipts, and delivering all incoming shipments: and will act generally as agent for the Central of Georgia

at it at its Fort Benning Junction station exactly as any of its other station agents.

4. Settlements to be made at the convenience of both parties, preferably every seven days, but monthly or semi-monthly also considered if more convenient.

5. All amounts received from the Central of Georgia under this agreement to be immediately repaid to the Central by Page and Harris until balance of $2,500. (and ac-
[fol. 193] crued interest) due on station is paid in full.

6. If Central of Georgia wishes to act favorably on suggestion of War Department in Washington and make arrangement retroactive to December 4th, 1933, Page and Harris will accept $5.00 per car (now due or already paid by the Finance Office) and will refund to the War Department any amounts collected by them on government shipments over the Central of Georgia since that date."

It is understood that the terms and conditions contained in this memorandum are the same as you have with the Seaboard Air Line Railway for handling such shipments delivered by that line at interchange track at Fort Benning Junction and the same service will be given the business received from our line as that received from the Seaboard Air Line Railway.

Yours very truly, (S.) C. Baldwin, Superintendent.

EXHIBIT No. 27

Docket 26483

Columbus, Ga., March 17, 1934. rm.

File 175–18–A

Messrs. Page & Harris, Fort Benning Railroad, Fort Benning, Ga.

Attention Mr. Harris

GENTLEMEN:

Confirming phone conversation with you this date:

Please be advised that for the present and until further notice the Central of Georgia can only pay the agreed

amount on cars of freight moving on Government bills of lading consigned to the Government, Fort Benning.

It would be a violation of the law, in view of having no [fol. 194] tariff to cover, if we paid you on any freight moving on commercial bills of lading.

Yours very truly, (S.) C. Baldwin, Superintendent.

EXHIBIT No. 28

Docket 26483

H. A. Page, Jr. G. F. Harris.

Page & Harris

Contracting Operators of Fort Benning Railroad, Fort Benning, Ga.

March 18, 1934.

Mr. C. Baldwin, Supt., Central of Georgia Railway, Columbus, Ga.

DEAR SIR:

Re Your file 175—18-A.

Receipt is acknowledged of your letter of March 17th, 1934, confirming telephone conversation of that date, wherein you advise us "that for the present and until further notice the Central of Georgia Railway can only pay the agreed amount on cars of freight moving on Government Bills of Lading consigned to the Government at Fort Benning."

Conformable thereto, please be advised that henceforth and until further notice we will receive from the Central of Georgia Railway on the interchange tracks at Fort Benning Junction only such Government freight as is shown by manifest to be moving on Government bills of lading.

Such Government freight so moving on Government bills of lading received by us on the interchange tracks at Fort Benning Junction will be handled by us for the account of the Central of Georgia Railway under our agreement with it, entered into on Feby. 21, 1934.

Referring to our letter of February 20th, 1934, to Mr. H. D. Pollard, Receiver of the Central of Georgia Railway, [fol. 195] Savannah, Ga., thru' Mr. T. P. Wade, District Freight Agent, Central of Georgia Railway, Columbus, Ga., (copy to you), regarding such Government freight not moving on Government bills of lading, please be advised:

1. That until further notice, no such shipments will be handled by us and that further use by the Central of Georgia Railway (for such shipments of freight) of the interchange tracks at Fort Benning Junction, or any other trackage facilities under lease to us from the Government, is prohibited.

Copies hereof and of your letter of March 17, 1934, here responded to, are being furnished the Quartermaster General at Washington, D. C., and the Commandant at Fort Benning, Ga.

We will be pleased, at your pleasure, to resume handling such shipments of Government freight not moving on Government bills of ladings under the terms of our agreement of Feby. 21, 1934, covering same.

Very truly yours, Page & Harris, by (Sgd.) C. F. Harris.

(The Government railroad in the Fort Benning Military Reservation is not a common carrier and Page & Harris operate it entirely as private contractors in individual relation to each Government contractor they may agree to serve, hence their liability is only that of non-common carrier private contractors.)

(Exhibits Nos. 29, 30, 31, 32, 33 and 41 omitted for the reasons hereinabove stipulated.)

[fol. 196] EXHIBIT No. 34

Docket 26483

Number of Cars of Freight Handled by the Central of Georgia Railway and Seaboard Air Line Railway to and from Fort Benning Junction, Ga., During Period October 1, 1933 to June 8, 1934, Inclusive, Showing Cars Handled for United States Government and Cars Handled for Contractors

A—Government Freight. 1—To Fort Benning Junction, Ga.
B—Contractors Freight.
C—Total. 2—From Fort Benning Junction, Ga.

		Central of Georgia Railway			Seaboard Air Line Railway			
Date of Movements		A	B	C	A	B	C	Total
October, 1933	1	96	16	112	97	27	124	236
	2	7	..	7	10	..	10	17
November, 1933	1	102	19	121	145	7	152	273
	2	25	..	25	7	..	7	32
December, 1933	1	103	51	154	109	30	139	293
	2	5	..	5	4	..	4	9
January, 1934	1	68	54	122	48	26	74	196
	2	2	..	2	5	..	5	7
February, 1934	1	50	11	61	114	76	190	251
	2	2	..	2	5	..	5	7
March, 1934	1	82	6	88	108	145	253	341
	2	6	..	6	11	..	11	17
April, 1934	1	82	5	87	83	173	256	343
	2	5	..	5	22	..	22	27
May, 1934	1	58	9	67	131	205	336	403
	2	9	..	9	17	..	17	26
June 1st to 8th, 1934	1	15	3	18	29	48	77	95
	2	3	..	3	9	..	9	12
Totals								
To Ft. Benning Junction		656	174	830	864	737	1601	2431
From Ft. Benning Junction		64	..	64	90	..	90	154
		720	174	894	954	737	1691	2585

[fol. 197] EXHIBIT No. 35

Docket 26483

Norfolk, Va., December 16, 1933.—A.

Personal and Confidential

Mr. H. D. Pollard, Receiver, Central of Georgia Railway, Savannah, Ga.

DEAR MR. POLLARD:

Since the conference in your office on Monday, the 11th instant, we have given further consideration to the matter

of a switching allowance to Page and Harris (as agents for the Government) in connection with the operation of the Government railroad at Fort Benning, and I have indicated to Mr. Page we would not be disposed to go ahead with any switching allowance that was not reasonably satisfactory to both you and ourselves.

Yours very truly, (Sgd:) C. R. Capps, Chief Traffic Officer.

Copy to: Mr. W. McN. Knapp, T.M., Central of Georgia Ry., Savannah, Ga. Personal and Confidential.

EXHIBIT No. 36

Docket 26483

Norfolk, Va., January 27, 1934.—A.

Personal and Confidential

Mr. H. D. Pollard, Receiver, Central of Georgia Railway, Savannah, Ga.

DEAR MR. POLLARD:

In view of subsequent occurrences, this is to advise you that I am no longer disposed to continue under the obligation assumed in my letter of December 16th with respect to switching allowances to Page and Harris, contractors, operating the Government railroad at Fort Benning.

Yours very truly, (Sgd.) C. R. Capps, Chief Traffic Officer.

[fol. 198] Copy to: Mr. W. McN. Knapp, T. M., Central of Georgia Railway, Savannah, Ga. Personal and Confidential.

EXHIBIT No. 37

Docket 26483

January 30, 1934.

Personal

Mr. C. R. Capps, Chief Traffic Officer, Seaboard Air Line Railway, Norfolks, Virginia.

DEAR MR. CAPPS:

I have your letter of January 27th.

Won't you kindly advise what the subsequent occurrences are to which you refer, and what, if anything, you now propose to do with regard to allowances to Messrs. Page & Harris?

Very truly yours, —— ——, Receiver.

Copy to Mr. Knapp.

EXHIBIT No. 38

Docket 26483

10:35 A., Savannah, Ga., February 10, 1934.

Secretary of War, Washington, D. C.:

Will you please advise me whether or not any change has been made in either of the two contracts between the War Department and the Quartermasters Department with Page and Harris with reference to lease and operation of railroad at Fort Benning, Georgia, and if there has been any change I would be much obliged if you will inform me as to what the changes are.

CAK 13813— H. D. Pollard.

[fol. 199]

EXHIBIT No. 39

Docket 26483

1934 MAR. 6 PM 12 29.

H. D. Pollard, Receiver Central of Ga. Railway:

REFERENCE YOUR TELEGRAM FEBY. TENTH NO CHANGE HAS BEEN MADE IN EITHER LEASE OR CONTRACT WITH PAGE AND HARRIS.
HARRY H. WOODRING, THE ASST. SEC. OF WAR.

EXHIBIT No. 40

Docket 26483

Southern Freight Association

Atlanta, Ga., June 11th, 1934. rrm.

File 1

Mr. C. R. Capps, C.T.O., S.A.L.Ry., Care Mr. F. C. Cheney, AFTM, SAL Ry., Atlanta, Ga.

DEAR MR. CAPPS:

Referring to our phone conversation today, in which you requested reply to your letter of May 10th inquiring whether railroads members of the Southern Freight Association have filed proposals covering changes in switching limits. We have been unable to locate your letter of May 10th and it evidently went astray.

We have examined our records and fail to find where carriers have filed proposals changing ordinary switching limits; that is, switching limits within a city or town. Proposals have been filed where a railroad proposes to extend the switching limits or industrial district to embrace a station previously treated as a separate station. As an illustration, our Submittal 53465 of January 6th, 1931, covers Southern Railway Proposal 8996 providing for extension of the Atlanta industrial district to include Austell, Ga., and certain other intermediate stations. Another illustration is our Submittal 53698 of January 23rd, 1931, which proposes certain changes in the application of the rates to and from individual points in the Birmingham and Atlanta districts.

Proposals have also been filed covering proposed changes in the switching charges at various competitive points.

Yours very truly, (Sgd.) J. E. Tilford, Chairman.

[fol. 200] EXHIBIT No. 42

Docket 26483

WCS–CWP.

January 9, 1922.

Mr. L. S. Cass, Vice-President, American Short Line Railroad Association, 1319-1321 F Street, Northwest, Washington, D. C.

DEAR SIR:

Referring further to your letter of December 8, 1921, which submitted an application from the Charlotte Harbor & Northern Railway Company, dated December 5, 1921, requesting permission under Section 15 of the Interstate Commerce Act to make an allowance to the King Lumber & Manufacturing Company for handling cars between the Citrus packing houses at Nocatee, Fla. and the rails of the Charlotte Harbor & Northern Railway Company:

This matter has been considered by the Commission. As the King Lumber Company is not the owner of the property to be transported, no allowance can be made under the provisions of Section 15, paragraph (13). On the other hand it would appear to be lawful for the carrier to hire the King Company to perform the service in question as its agent, for a reasonable compensation, assuming that nothing will be done which will give the King Company as a shipper an advantage over its competitors or constitute, in substance, a rebate. If such an agency arrangement should be made, the Charlotte Harbor and Northern would, of course, be the common carrier to and from the tracks at or near the packing houses, and its tariffs should so state.

[fol. 201] The Commission expresses no opinion as to what would be a reasonable compensation for the services to be performed.

Respectfully, —— ——, Secretary.

EXHIBIT No. 42, Docket 26483 (Continued)

The American Short Line Railroad Association, Seventh Floor International Building,

1319-1321 F Street, N. W., Washington, D. C.

December 8, 1934.

Mr. W. V. Hardie, Director, Bureau of Traffic, Interstate Commerce Commission, Washington, D. C.

DEAR SIR:

Attached hereto I am handing you 15th Section Application of the Charlotte Harbor & Northern Railway Company for permission to enter into an arrangement with the King Lumber & Manufacturing Company to handle cars for them between the citrus packing houses at Nocatee, Florida, and the Rails of the Charlotte Harbor & Northern Ry. Co.

Under date of November 14th I wrote you and submitted to you a copy of the contract proposed to be entered into, together with a blue print showing the location of the citrus fruit packing houses and the tracks of the King Lumber & Manufacturing Company and the Charlotte Harbor & Northern Rwy. Company at Nocatee, Florida, which should be made a part of this application attached hereto.

We will very much appreciate having early attention given to this case as the Charlotte Harbor & Northern Railway Company are sorely in need of this business.

Yours very truly, (Signed) L. S. Cass, Vice-President.

[fol. 202] EXHIBIT No. 42, Docket 26483 (Continued)

Charlotte Harbor & Northern Railway Company

Traffic Department

DeSoto National Bank Building, Arcadia, Florida

December 5th, 1921.

Commission's No. —

Carriers' No. 1108–1

15th Section Application

To the Interstate Commerce Commission, Washington, D. C.:

The Charlotte Harbor & Northern Railway Company by G. P. LeMoyne its General Freight Agent, does hereby petition the Interstate Commerce Commission, under Section 15 of the Act to Regulate Commerce as amended August 9th, 1917 and Acts amendatory thereof or supplementary thereto, for authority to enter into an agreement with a logging road known as the King Lumber & Manufacturing Company (a road not subject to the provisions of the Act as a common carrier), for the following purposes:

I

To Pay to the King Lumber & Manufacturing Company a charge for switching empty cars from the connection of the Charlotte Harbor & Northern Railway Company with such logging road, into citrus packing houses at Nocatee, Florida, and cars loaded with citrus fruit from Citrus packing houses at Nocatee, Florida, to the connection of logging road with this company. The stated charge to be that named in the proposed agreement between this Company and the King Lumber and Manufacturing Company, as shown in Exhibit "A" attached to and made a part hereof.

II

Your petitioner bases such request upon the following facts, which present all of the circumstances and condi-

tions relied upon by your petitioner in justification of the request made herein.

The line of the Charlotte Harbor & Northern Railway Company extends through a town on its rails known as Nocatee, Florida. The Atlantic Coast Line Railroad Company also passes through this point, the distance between [fol. 203] the station of the Atlantic Coast Line Railroad Company and that of the Charlotte Harbor & Northern Railway Company is approximately one-half of one mile. There is no track connection between the Atlantic Coast Line Railroad Company and the Charlotte Harbor & Northern Railway Company at Nocatee, Florida, other than over the rails of the logging road known as the King Lumber & Manufacturing Company, which logging railroad connects with both the Atlantic Coast Line Railroad Company and the Charlotte Harbor & Northern Railway Company. At a point between the Atlantic Coast Line Railroad Company and Charlotte Harbor & Northern Railway Company at Nocatee is located two citrus fruit packing houses. The Atlantic Coast Line Railroad Company has spur tracks that extend from its main line to each of these packing houses, the logging road also has spur tracks to each of these packing houses. The Charlotte Harbor & Northern Railway Company has no tracks into the packing houses, and is therefore, unable to reach them except over the rails of the logging road. The Charlotte Harbor & Northern Railway Company cannot secure right-of-way from its main line to the packing houses mentioned for the purpose of building spur tracks and due to the rails of the logging road being very light it would be unsafe for any of the locomotives owned by the Charlotte Harbor & Northern Railway Company (owing to their weight) to venture on same, making it impracticable to lease the tracks of the King Lumber & Manufacturing Company. The rates on citrus fruit from Nocatee, Florida, to destination shown in Agent J. H. Glenn's I. C. C. No. A-310 (Florida Orange-Pineapple Tariff No. 7), and destinations shown in Agent F. A. Leland's I. C. C. No. 1493 are the same via both the Atlantic Coast Line Railway Company and the Charlotte Harbor & Northern Railway Company, the proposed allowance for switch service at Nocatee, Florida, to be absorbed

out of the proportion of the Charlotte Harbor & Northern Railway Company.

Your petitioner prays that the Commission will grant the relief sought in view of the above statement of facts.

Charlotte Harbor & Northern Railway Co., by
(Signed) G. P. LeMoyne, General Freight Agent.

[fol. 204] STATE OF FLORIDA,
County of DeSoto, ss:

Subscribed and sworn to by G. P. LeMoyne, before me this 5th day of December, 1921.

(Signed) Bruce L. Davis, Notary Public, State of Florida at Large. My Commission expires December 8, 1923. (Seal.)

By the Commission.

EXHIBIT No. 43
Docket 26483

Estimated Cost of Operating Two L-5 Locomotives and One Odd Locomotive at Columbus, Ga. Yard, Including Fort Benning, Versus Present Cost of One L-5 and One Odd Engine

Proposed Service

1. Wages (2L-5s)	Engineers	Straight time		26 days each	7.33	$381.16	
	Firemen	"	"	26 "	" 5.75	299.00	
	Conductors	"	"	26 "	" 7.14	371.28	
	Switchmen	"	"	26 "	" 6.62	344.24	
	"	"	"	26 "	" 6.62	344.24	
	Total Wages—L-5 engines,					$1,739.92	
	(1-Odd) Engineer	"	"	26 "	7.16	186.16	
	Firemen	"	"	26 "	5.63	146.38	
	Conductor	"	"	26 "	7.14	185.64	
	Switchman	"	"	26 "	6.62	172.12	
	"	"	"	26 "	6.62	172.12	
	Total Wages—Odd engine					$862.42	
	" "	Basic rates				2,602.34	
	" "	Less 10%					$2,342.11
2. Fuel		312 tons		2.94			912.28
3. Locomotive Repairs		3744 eng. miles		.2700			1,010.88
4. " Supplies		3744 "		.0161			60.28
5. Enginehouse Expenses (Miscellaneous)		3744 "		.0105			39.31
6. Yard Supplies & Expenses		3744 "		.0101			37.81
7. Transfer of switch engine to shops for repairs every 90 days							31.00
Total Cost per Month							$4,433.67

Present Service

1. Wages Engineer	Straight time	26 days	7.16	186.16	
	Overtime	90′ 05″	1.3425	120.93	
Fireman	Straight "	26 days	5.63	146.38	
	Overtime	85′ 45″	1.0575	90.68	
Conductor	Straight "	26 days	7.14	185.64	
	Overtime	85′ 45″	1.3400	114.91	
Switchman	Straight "	26 days	6.62	172.12	
	Overtime	85′ 45″	1.2425	106.54	
Switchman	Straight "	26 days	6.62	172.12	
	Overtime	85′ 45″	1.2425	106.54	
Total Wages—Basic Rates,				1,402.02	
" " Less 10%					1,261.82
2. Fuel	121 tons	2.94			355.74
3. Locomotive Repairs	1811 eng. miles	.2647			479.37
4. " Supplies	1811 "	.0161			29.16
5. Enginehouse Expenses	1811 "	.0105			19.02
6. Yard Supplies & Expenses	1811 "	.0101			18.29
Total Cost Per Month					$2,163.40
Increase—Proposed over Present					$2,270.27

[fol. 205] EXHIBIT No. 44

Docket 26483

June 8, 1934.

Honorable William E. Lee, Chairman, Interstate Commerce Commission, Washington, D. C.

DEAR MR. LEE:

Information has been received that June 14, 1934, has been assigned as a date for a hearing at Atlanta, Georgia, on a complaint to the Interstate Commerce Commission by the Receiver of the Central of Georgia Railway Company against Page and Harris who are contractors now operating the Government Railroad at Fort Benning, Georgia, as to their relation with the Government and with the Seaboard Air Line Railroad. The complaint, *inter alia*, prays the Commission to terminate the operation by Page and Harris of the Fort Benning Railroad.

The operation of the Fort Benning Railroad by Page and Harris under contract with the War Department has been eminently satisfactory to the local military authorities and has resulted in a very considerable saving in appropriations over the arrangement in effect when the Central of Georgia Railway was operating the Government tracks at Fort Benning, and for this reason the War Department is interested in the maintenance of the present operating arrangement of the Government Railroad by Page and Harris, the contractors. From all available information, it is believed that the complaint of the Central of Georgia Railway Company is without merit, and that the evidence which will be produced at the hearing at Atlanta, Georgia, on June 14, 1934, will impel the conclusion that the present switching arrangements at Fort Benning should not be disturbed.

In this connection the War Department will be represented at the hearing at Atlanta, Georgia, on June 14, 1934, by Captain Edward C. Betts, J.A.G.D., who is thoroughly familiar with all the circumstances regarding the controversy between the Central of Georgia Railway Company and the contractors, Page and Harris.

Sincerely yours, (Signed) Harry H. Woodring, Acting Secretary of War.

[fol. 206] EXHIBIT No. 45

Docket 26483

Page & Harris

Contract Operators of Fort Benning Railroad,
Fort Benning, Ga.

December 21, 1933.

Colonel J. DeCamp Hall, Quartermaster, Fort Benning, Georgia.

DEAR COLONEL HALL:

Doubtless you have already been advised of the refusal, on December 11th, of the Interstate Commerce Commission to reopen and reconsider its final decision to disallow common carrier status to the Fort Benning Railroad. This petition for reopening and reconsideration was urged upon the Interstate Commerce Commission by the Secretary of War, in furtherance of his desire that the Fort Benning Railroad furnish the Government with that common carrier service it was bound to furnish, from Fort Benning Junction to Fort Benning, by its contract with the Government.

Pending the vesture of the Fort Benning Railroad with a common carrier status, it was provided in that contract, among other things, that "Temporarily, until * * * the Fort Benning Railroad * * * obtains a certificate of convenience and necessity from the Interstate Commerce Commission, the Contractors will act wholly in the capacity of private contractors for the Government, and as the agent of the Government and not as a common carrier, will call for and deliver and transport cars loaded and empty between Fort Benning, Georgia, and the connection with the Central of Georgia Railway at Fort Benning Junction, Georgia, * * * and for that period only of emergency service between Fort Benning and the connecting common carrier railroads, the contractors shall be paid Five Dollars ($5.00) per loaded car, but will make no charge for the movement of empty cars * * *".

Those provisions emphasize and make manifest the common understanding between the Government and its Contractor that the compensation of $5.00 a car there provided [fol. 207] was not regarded as anything but an expedient

measure biding the time of the acquisition of common carrier status by the Fort Benning Railroad. In pursuance of these provisions, the Fort Benning Railroad has been paid $5.00 a car by the Government for each carload lot of freight, transported from Fort Benning Junction to Fort Benning, and the return of the empty car to Fort Benning Junction.

For the switching of all such cars, and the rendition of a complete intra-Reservation service, to the Government, as required by said contract, the Government has paid the Fort Benning Railroad $1000.00 a month, in accordance with the provisions of the contract.

At present, the Fort Benning Railroad switches all car lots of freight consigned to consignees, other than the Government, without receiving any compensation therefor, for which like switching and intra-plant service done on behalf of the Government it receives $1000.00 a month. The only expense to the consignee of car lots of freight, other than the Government, is the $5.00 charge which is made by the Fort Benning Railroad for the hauling of the loaded car from Fort Benning Junction to Fort Benning and return of that empty car to Fort Benning Junction. No compensation is being received for the rendition by the Fort Benning Railroad to such consignee of the switching service, which was of relatively insignficant volume at the time the contract was entered into. During the recent past, presently, and for some time into the future, the requirements for such switching and intra-plant service consignees of car lot shipments of freight (other than the Government) did, do, and will, constitute a relatively heavy switching service of the Fort Benning Railroad. This switching service is now being rendered by the Fort Benning Railroad to such consignees, without cost fo such consignees, at the loss to the Fort Benning Railroad and the threatened expense to the United States Government of impaired switching and intra-plant service rendered by the Government and for which it pays at the rate of $1000.00 a month.

The rendition of adequate switching and intra-plant service to such consignees (other than the Government) of car lot shipments of freight is being accomplished by the Fort Benning Railroad through the expedient of providing, at [fol. 208] its own expense, additional train and yard crew service. The cost of this additional service constitutes a

financial loss to the Fort Benning Railroad, for which it receives no compensation.

The reasonable cost of furnishing such switching and intra-plant service to consignees (other than the Government) of car lot shipments of freight from Fort Benning Junction to Fort Benning is $7.50 per car (for which consignees of car lot shipments of freight pay $5.00), this in view of the inadequate and poorly arranged yard facilities at the terminus of the haul from Fort Benning Junction to Fort Benning. Accordingly, it is the intention of the Fort Benning Railroad to make a charge of $7.50 per car, effective January 1, 1934, and thereafter, for the rendition by it of the necessary switching and intra-plant service for such car lot shipments of freight after being hauled from Fort Benning Junction to Fort Benning, for which hauling service, and the returning of the empty cars to Fort Benning Junction, the Fort Benning Railroad now receives $5.00. Thus, the total charge made by the Fort Benning Railroad on and after January 1, 1934, for each carload shipment of freight consigned to a consignee other than the Government will be $12.50. Provided, of course, the Government interposes no objections.

Accordingly, it is requested that we be advised if the Government objects to the imposition of this additional charge for such switching and intra-plant service.

Very truly yours, (H. A., Jr.) Page and (C. F.) Harris.

[fol. 209] Exhibit No. 45, Docket 26483 (Continued)

12-21-33.

1st. Ind.

Headquarters the Infantry School, Office of the Commandant, Fort Benning, Georgia, December 22, 1933—To The Quartermaster General, War Department, Washington, D. C.:

1. Inasmuch as the government is required to pay now $5.00 per car and in addition the monthly sum of $1000.00 in order to obtain freight over its own line, it would seem that an additional charge of $7.50 per car for switching and intra-plant service on other than government freight would be equitable and fully justified.

2. It is considered undesirable to require adherence to a flat rate of $5.00 per car, which was fixed as a temporary charge and predicated upon an issuance of a Public Convenience and Necessity Certificate which would have permitted the Fort Benning Railroad Company additional revenue.

3. In view of the above, it is recommended that sympathetic consideration be given to the announced intention of the Fort Benning Railroad to make such a charge and to take such measures for relief as may be legal and just.

G. H. Estes, Brigadier General, U. S. Army, Commandant.

QM. 551.2 T-r (Ft. Benning).

2nd Ind.

War Department, OQMG, Washington, December 27, 1933. —To Commanding General, Fort Benning, Ga.:

1. Approved as recommended in 3rd paragraph, 1st indorsement.

For The Quartermaster General:

A. E. Williams, Brigadier General, Assistant.

Exhibit No. 45, Docket 26483, (Continued)

12-21-33.

3d Ind.

Headquarters the Infantry School, Office of the Commandant, Fort Benning, Georgia, January 2, 1934—To H. A. Page, Jr. and C. F. Harris, Fort Benning Railroad, Fort Benning, Ga. (Through: The Quartermaster, Fort Ben-
[fol. 210] ning, Ga.):

Inviting attention to the foregoing indorsements.

For the Commandant:

R. B. Lovett, Captain, Infantry, Assistant Adjutant.

Exhibit No. 46

Docket 26483

Contract No. —.

This Supplemental Lease made between the Secretary of War, of the first part, and H. A. Page, Jr., of Aberdeen,

North Carolina, and C. F. Harris, of Fayetteville, North Carolina, (hereinafter designated as the Lessees) of the second part,

Witnesseth:

Whereas, under date of September 9, 1932, the Secretary of War, pursuant to the authority conferred upon him by the Act of Congress approved July 28, 1892 (27 Stat. 321), leased to the Lessees and their assigns for a period of five (5) years from October 18, 1932, but revocable at the will of the Secretary of War, all Government-owned standard gauge railway trackage within the boundaries of the Fort Benning Military Reservation and extending between Fort Benning and said Reservation to points of present and future junction and interchange connection with the Central of Georgia Railway and the Seaboard Air Line Railway in the vicinity of the Reservation, including all rails, switches, frogs, ties, ballasts, spikes, fastenings, extensions and terminals; and

Whereas, in addition to the service presently provided by the said H. A. Page, Jr., and C. F. Harris, as Government contractors, it is desirable to make available common carrier service to Fort Benning proper through one or more of the common carrier trunk line railroads now operating to or in the general vicinity of Fort Benning Junction, Georgia;

Now, Therefore, the Secretary of War, pursuant to the authority conferred upon him by said Act of Congress, hereby amends said Lease so as to change Condition (9) [fol. 211] thereof to read as follows:

(9) That this lease shall not be assigned nor the property sublet without the approval in writing of the Secretary of War, except that the Lessees, subject to all the terms, provisions and conditions hereof, may sublet or assign their rights hereunder to the railroad tracks extending from Fort Benning Junction to the railway station at Fort Benning proper, including the interchange tracks in the vicinity of Fort Benning Junction and receiving and delivery tracks at Fort Benning station, to any or all common carrier trunk line railroads operating to or in the general vicinity of Fort Benning Junction; namely, the Central of Georgia Railway, the Seaboard Air Line Railway and the Southern Railway, Provided such subleases or assignments are first

approved by the Commanding Officer of the Fort Benning Military Reservation, and Further Provided, that such subleases or assignments as may be approved by said Commanding Officer shall not affect in any manner nor to any extent to lessen or modify the obligations or liabilities of the Lessees hereunder.

In All Other Respects the said original lease here amended shall remain in full force and effect.

Witness my hand and the seal of the War Department this — day of ——, 1934.

——. ——.

This Supplemental Lease is executed by the Lessees this — day of ——, 1934.

——. ——.

Signed and sealed in the presence of: —— ——.

[fol. 212] Endorsement on Exhibit No. 46, Docket 26483

War Department,

Office of the Assistant Secretary, Washington, D. C.

January 24, 1934.

Memorandum for The Quartermaster General

Subject: Modification of Lease of Fort Benning Railroad

1. Since the result desired may be accomplished under the existing lease, there appears to be no necessity for the Secretary of War to delegate authority to the Commanding General, Fort Benning, which is the purpose of the proposed supplemental lease presented herewith. The War Department's primary concern is that adequate common carrier service be provided for Fort Benning under such terms as will be for the best interests of the government. Accordingly

a. There is no objection to Page and Harris negotiating a common carrier service agreement with any or all trunk line railroads provided equally fair and identical terms are offered to all the common carriers, and that these agreements will not at any time exclude any other common carrier from rendering similar service.

b. Since the details of any such agreement between Page and Harris and the railroads and the question of the amount of any consideration to be received by Page and Harris may be very material in determining whether approval should be given by the War Department, the agreement should be submitted to the Secretary of War for his approval in accordance with the terms of the existing lease.

(Signed) Harry H. Woodring, The Assistant Secretary of War.

2 Incls.
1 tr. fr. Page & Harris 1/11/34, with 2 Inds. and 1 incl.
Memo from JAG 1/23/34.

[fol. 213]

EXHIBIT No. 47

Docket 26483

Statement Showing Number of Cars Handled by Page & Harris for the Receivers, and the Payments Made Therefor, Between December 4, 1933 and the First Half of June, 1934

	No. of Cars	Amount of Agent's Statement	Deductions For Over-Payment*	Paid Agents Page & Harris
Dec. 4, 1933 to Jan. 31, 1934, inc.	203	$2,575.00	$178.83	$2,396.17
February, 1934	195	2,437.50	136.64	2,300.86
First half March, 1934	117	1,462.50	34.46	1,428.04
Second half March, 1934	143	1,787.50	57.32	1,730.18
First half April, 1934	130	1,625.00	125.24	1,499.76
Second half April, 1934	142	1,775.00	87.86	1,687.14
First half May, 1934	166	2,075.00	**	2,075.00
Second half May, 1934	188	2,350.00	**	2,350.00
First half June, 1934	164	2,050.00	**	2,050.00
Total	1,448	$18,137.50	$620.35	$17,517.15

*Consist of refunds for payments made at the full rate of $12.50 per car for cars on which the Receivers' gross revenue was less than $25.00.
**Amount of deductions not available.

OFFER IN EVIDENCE

[fol. 214] 7. A duly certified copy of the record and evidence in the application of Fort Benning Railroad Company to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity, Finance Docket No. 9709, was introduced in evidence in the complaint of H. D. Pollard, as Receiver of Central of Georgia Railway Company, before the Interstate Commerce Commission, known as Docket No. 26483. Upon the insistence of

Counsel for the Defendants, and by direction of the Court, a duly certified copy of all the record, evidence and exhibits in said Finance Docket No. 9709 was introduced in evidence in this case, and is as follows:

RECORD IN FINANCE DOCKET NO. 9709

It is stipulated that the following parts of the record in Finance Docket No. 9709 are material to the consideration of this case:

(a) Application of Fort Benning Railroad Company, together with Exhibits "A" and "B", omitting Exhibit "C", which is a map of the Fort Benning Railroad.

(b) Return to Questionnaire, omitting Exhibit "E", which is a map of Fort Benning Railroad and its connections, which is hereby agreed to be immaterial.

(c) Petition of Central of Georgia Railway Company for leave to intervene.

(d) Order of the Commission of December 15, 1932, allowing Central of Georgia Railway Company to intervene.

(e) Intervention of H. D. Pollard, as Receiver of Central of Georgia Railway.

(f) Report of Division 4 of the Commission dated June 14, 1933.

(g) Order of the Commission dated July 11, 1933, reopening the proceeding for re-argument.

(h) Report and Order of the Commission dated October 4, 1933, denying, on re-argument, the requested certificate.

(i) Order of the Commission dated December 11, 1933, denying petition of Fort Benning Railroad Company for re-opening and re-consideration of the case.

All of these documents are copied below.

(a) APPLICATION OF FORT BENNING RAILROAD COMPANY

Comes now Fort Benning Railroad Company, the Applicant, under Paragraphs (18) to (21), inclusive, of Section 1 of the Interstate Commerce Act, as amended, for a certificate of public convenience and necessity for the ac-

[fol. 215] quisition and operation of a line of railroad extending from Fort Benning, Georgia, a point within the Fort Benning Military Reservation, to connections with the Seaboard Air Line Railway and the Central of Georgia Railway at Fort Benning Junction, Georgia, and respectfully shows as follows:

(a) The exact corporate name of the applicant is

Fort Benning Railroad Company

(b) The applicant is a corporation organized under the laws of the State of Georgia for the purpose of engaging in interstate Commerce by railroad subject to the Interstate Commerce Act, but is not now an operating corporation.

(c) The applicant does not propose to construct (1) a new line of railroad, or (2) an extension of an existing line of railroad, but to acquire and operate a line of railroad extending from Fort Benning, Georgia, a point within the Fort Benning Military Reservation, to connections with the Seaboard Air Line Railway and the Central of Georgia Railway at Fort Benning Junction, Georgia.

(d) Applicant proposes to operate in interstate commerce the said line of railroad under the terms of a lease entered into between the Secretary of War and Henry A. Page, Jr., and C. F. Harris, which said lease will be assigned by Henry A. Page, Jr., and C. F. Harris to the applicant, subject, however, to the approval of the Interstate Commerce Commission. A true copy of said lease is attached hereto as Exhibit "A" and prayed to be read as a part hereof. A true copy of an operating contract, under the terms of which the line of railroad in question is to be operated, is attached hereto as Exhibit "B".

The applicant has no relation, either traffic or financial, to any other operating or non-operating railroad corporation or corporations.

(e) Permission to retain excess earnings is requested.

(f) The acquisition and operation of the line of railroad now serving the Fort Benning Military Reservation by this applicant in the manner provided in said lease and operating agreement will give the Military Reservation the bene-

fit of service by an independent terminal carrier connecting both with the Seaboard Air Line Railway and the Central of Georgia Railway, thus giving the War Department activities at Fort Benning full benefit of service via competing trunk line routes. The line of railroad in question has in the past been operated by the Central of Georgia Railway exclusively in connection with its own line and subject [fol. 216] to an arbitrary which the Central of Georgia has imposed upon all traffic moving to or from the Fort Benning Military Reservation. Applicant proposes to eliminate all arbitraries for such service and to extend to the Fort Benning Military Reservation the benefit of the through rates now in effect to Fort Benning Junction, Georgia.

(g) Applicant's counsel to whom correspondence with regard to this application should be addressed are: Moultrie Hitt and G. Kibby Munson, 420 Union Trust Building, Washington, D. C.

(h) Fort Benning Railroad Company was incorporated on October 19th, 1932, under the laws of the State of Georgia. It is not incorporated under the laws of, or authorized to operate in, any other State.

(i) Stockholders and Directors of the applicant in meetings held, respectively, on October 25th, 1932, duly authorized the making and filing of this application.

(j) All of the lines of railroad for which authority to acquire and operate is herein sought are entirely within Muscogee and Chattahoochee Counties, Georgia.

(k) The line of railroad in question extends from Fort Benning, Georgia a point within the Fort Benning Military Reservation, to and across the line of the Seaboard Air Line Railway at Fort Benning Junction, Georgia, and to a connection with the Central of Georgia Railway at Fort Benning Junction, Georgia. It passes through no incorporated cities or villages.

(l) The total number of miles of main track for which authority to acquire and operate is herein sought is 6.807 miles, in addition to which there are approximately three miles of spur tracks which are necessary to reach distant points of activity within the Fort Benning Military Reservation.

(m) The applicant desires a hearing upon this application unless the certificate can be granted without the necessity for a hearing.

(n) A map showing the route of said line of railrpad is hereto attached as Exhibit "C".

The applicant is ready to furnish such other supporting evidence or data as may be necessary for the granting of the certificate of public convenience and necessity herein sought.

Wherefore, applicant prays that it be granted by the Interstate Commerce Commission a certificate of public convenience and necessity authorizing the acquisition and [fol. 217] operation of the lines of railroad herein described, and for such other order or orders as the Commission may consider proper in the premises.

Respectfully submitted, Fort Benning Railroad Company, by H. A. Page, Jr., President. Moultrie Hitt, G. Kibby Mumson, Counsel for Applicant, 420 Union Trust Building, Washington, D. C.

Filed November 4, 1932.

STATE OF NORTH CAROLINA,
County of Moore, ss:

H. A. Page, Jr., makes oath and says that he is the President of Fort Benning Railroad Company, the applicant herein; that he has been authorized by proper corporate action on the part of said applicant to verify and file with the Interstate Commerce Commission the foregoing application, and has knowledge of the matters and things therein set forth; and that the matters and things therein set forth are true of his own knowledge, except as to those things stated upon information and belief, and as to those he believes them to be true.

(Signed) H. A. Page, Jr.

Subscribed and sworn to before me this 31st day of October, 1932. (Signed) Evelyn Pleasants, Notary Public in and for the State and County Aforesaid. My commission expires: 1-7-33. (Notarial Seal.)

EXHIBIT "A" TO APPLICATION OF FORT BENNING RAILROAD COMPANY

Contract No.

This Lease made between the Secretary of War, of the first part, and H. A. Page, Jr., of Aberdeen, North Carolina, and C. E. Harris, of Fayetteville, North Carolina, and their assigns (hereinafter designated as the Lessees), of the second part, Witnesseth:

[fol. 218] That Whereas the Government is now receiving common carrier service from only one railroad, the Central of Georgia Railway Company, to and from Fort Benning, Georgia, and it is desirable for strategic reasons and to have the benefits of service by competing routes to have an increased access to additional railroad facilities and to have open and available an additional railroad outlet and inlet in connection with the Seaboard Air Line Railway to serve Fort Benning and the Fort Benning Reservation; and

Whereas the railroad rates, in general, to and from Fort Benning, Georgia, are on a basis whereby the Government pays the Central of Georgia a differential to and from Fort Benning substantially higher than the rates to Fort Benning Junction, Georgia, and it is desirable to stimulate and encourage a readjustment of rates to and from Fort Benning to be the same as the rates to Fort Benning Junction, and eventually save the Government the cost of the present differentials, and

Whereas the Government has its own system of standard gauge railroad tracks between Fort Benning Junction and Fort Benning, and within the Fort Benning Reservation connecting Fort Benning, and the various warehouses and parts of the Reservation for its own internal Intra Reservation convenience and necessities on which it operates its own intra-plant Reservation service; and it will be more economical to concentrate the common carrier movements in and out of Fort Benning and intra-plant Reservation service in the hands of one terminal operating organization to perform both functions.

Wherefore, the Secretary of War, by virtue of the authority conferred on him by the Act of Congress approved July 28, 1892 (27 Stat. 321), entitled "An Act authorizing the Secretary of War to lease public property in certain

cases," and in consideration of the performance by the lessees of the provisions and conditions hereinafter set forth, hereby leases to the lessees, for a period of five (5) years commencing on the date of execution of this lease by the lessees, but revocable at the will of the Secretary of War, all its standard gauge trackage within the boundaries of the Fort Benning Military Reservation and extending between Fort Benning and said Reservation to points of present and future junction and interchange connection with the Central of Georgia Railway and the Seaboard Air Line Railway in the vicinity of the Reservation, including all rails, switches, frogs, ties, ballasts, spikes, fastenings, extensions and terminals, subject to the following conditions:

[fol. 249] (1) That the consideration for the lease is the sum of One Hundred Dollars ($100.00) per annum, payable yearly in advance, the first installment of which shall be paid promptly upon the execution of this lease, and receipt of which is hereby acknowledged.

(2) That the use of the said railroad trackage, and terminals shall include the incidental use of such land and other facilities for a station, a right of way, and operating purposes, as may be required for the rendition of railroad service to the post generally and also for the operation of railroad common carrier service for the Government, for Government contractors and for the general public, between the inhabited portion of the Reservation where the buildings are located, referred to and designated as Fort Benning, Georgia, and all outside points in intrastate, interstate, and foreign commerce, provided that the incidental use of such land or other facilities shall at all times be subject to the approval of the Commanding Officer and to such other uses, assignments or changes as the Commanding Officer may see fit to require.

(3) That any damage, other than fair wear and tear, done to the railroad trackage, or other property of the United States incident to their use and operation by the lessees shall be promptly repaired to the satisfaction of the Commanding Officer.

(4) That the lessees are authorized to provide, on approval of the Commanding Officer, station facilities and

additional spur or side tracks necessary in connection with the providing of trackage to new buildings or other Government facilities on the Reservation; provided that such station facilities and tracks shall remain the property of the lessees, but the same shall be removed or relocated by the lessees whenever so directed by the Commanding Officer during the continuance of this lease.

(5) That the use of all property covered by this lease shall be subject to such rules and regulations as the Commanding Officer, or other competent authority, may from time to time prescribe.

(6) That the United States shall not be liable for any injuries to persons or damage to property resulting from accidents or other causes incident to the use and operation by the lessees of the premises covered in this lease, or that may arise from or incident to military or other Governmental activities on said Reservation, and the lessees shall hold the United States harmless from any and all such claims.

[fol. 220] (7) That the lessees shall furnish a bond in the sum of Ten Thousand Dollars ($10,000.00), with good and sufficient surety, conditioned upon the faithful performance of all the provisions and conditions of this lease.

(8) That this lease is revocable at the will of the Secretary of War and may be terminated by the lessees after a period of one (1) year by giving (60) days notice in advance in writing to the Commanding Officer.

(9) That this lease shall not be assigned nor the property sublet without the approval in writing of the Secretary of War.

(10) That on or before the termination of this lease or its expiration, the lessees shall return all Government property hereby leased, vacate the premises, and remove all property owned by them from the Reservation. If, however, this lease is revoked, the lessees shall forthwith return all Government property, vacate said premises, and remove their property from the Reservation within such time as the Secretary of War may indicate. In either event, if the lessees shall fail or neglect so to do, then at the option of the Secretary of War the property of the

lessees may either become the property of the United States without compensation therefor, or it may be removed at the expense of the lessees, and no claim for damages against the United States, its officers or agents, shall be created by or made on account thereof.

Witness my hand and seal of the War Department this 9th day of September, 1932.

(Signed) F. H. Payne, The Assistant Secretary of War.

This Lease is also executed by the lessees this 18th day of October, 1932.

(Signed) H. A. Page, Jr., C. F. Harris.

Signed and sealed in the presence of: A. E. Williams, R. E. Shannon.

EXHIBIT "B" TO APPLICATION OF FORT BENNING RAILROAD COMPANY

Contract No. W 148 qm 1827.

This Contract, entered into this 16th day of October, 1932, by the United States of America, hereinafter called the Government, represented by the contracting officer [fol. 221] executing this contract, and H. A. Page, Jr., of Aberdeen, N. C., and C. F. Harris, of Fayetteville, N. C., hereinafter called the Contractors, witnesseth that the parties hereto do mutually agree to and with each other as follows:

(1) That the Contractors will promptly organize a railroad corporation to which their rights will be assigned if, when and as approved by the Government subject to the conditions herein set forth, which corporation will be known as the Fort Benning Railroad, which will, when, and subject to, a certificate of convenience and necessity to engage in interstate commerce is granted and made effective by the Interstate Commerce Commission, operate as a common carrier under and in obedience to and pursuant to the laws of the United States and of the State of Georgia and hold itself out to render under appropriate freight tariffs such common carrier freight service thereunder as may be re-

quired not only to the Government but also to its officers and its men and to Government and private contractors and to all other shippers and receivers of freight and to the public generally as may be required to and from the inhabited portion of the Fort Benning Military Reservation now known as Fort Benning and hereafter to be designated as the station of Fort Benning, and, therefore, nothing contained in this contract shall be construed to limit or restrict the Contractors and or their assigns, including the Fort Benning Railroad when organized and authorized, from functioning as a common carrier when authorized to do so by the Interstate Commerce Commission, and participating in line haul rates on freight and or passenger traffic for the Government and contractors for the Government and officers and men of the Army and for the public generally, originating outside of the Fort Benning Military Reservation destined to Fort Benning, Georgia, or the Fort Benning Military Reservation, or which originates at Fort Benning, Georgia, or inside the Fort Benning Military Reservation destined to points outside of that Reservation, or to and from and or between any intermediate points between Fort Benning and Fort Benning Junction, Provided: That no regular scheduled passenger traffic as common carrier shall be inaugurated or maintained except as authorized and prescribed by the Contracting Officer.

(2) When authorized by the Interstate Commerce Commission to function as a common carrier, the Contractors and or their assigns, including the Fort Benning Railroad when organized, will immediately use their best efforts to [fol. 222] accomplish the object desired by the Government of establishing a full and complete line of unrestricted through routes and joint line haul common carrier rates to and from Fort Benning, Georgia, as low or lower than the rates heretofore lawfully applied or which may be hereafter lawfully applied to Fort Benning Junction; and on all local placements or switching or movements of loaded or empty standard gauge passenger or freight cars between points wholly within the Reservation on standard gauge tracks, after common carrier transportation has ended or before common carrier transportation has begun, or other than common carrier transportation, no charge except as provided in paragraph (4) of this instrument will be assessed by the Contractors or the Fort Benning Railroad.

(3) Temporarily, until the Contractors and/or their assigns and/or the Fort Benning Railroad when it is organized and obtains a certificate of convenience and necessity from the Interstate Commerce Commission, the Contractors will act wholly in the capacity of private contractors for the Government, and as the agent of the Government and not as a common carrier, will call for and deliver and transport cars loaded and empty between Fort Benning, Georgia, and the connection with the Central of Georgia Railway at Fort Benning Junction, Georgia, and/or a connection with the Seaboard Air Line Railway in that vicinity; and for that period only of emergency service between Fort Benning and the connecting common carrier railroads, the Contractors shall be paid Five Dollars ($5.00) per loaded car, but will make no charge for the movement of empty cars; provided, that thirty (30) days after a certificate of convenience and necessity by the Interstate Commerce Commission for common carrier operation is made effective, the Contractors will no longer render the service described in this paragraph as Contractors, and will no longer be paid this compensation of Five Dollars ($5.00) per loaded car as aforesaid; but will thereafter rely for their compensation upon the revenue to be derived from operation as a common carrier as contemplated in paragraphs (1) and (2) hereof.

(4) The Contractors and/or their assigns, including the Fort Benning Railroad, will operate an intra-Reservation facility to transport to and from points in the Government owned trackage in intra-Reservation service, as may be designated by the Contracting Officer and/or his successor or successors, all freight in carload or less-than-carload quantities, and similarly, when required, will transport passenger and baggage and other standard gauge cars in-
[fol. 223] cident to troop movements to and from points of connection with other carriers connecting with the Fort Benning Railroad, and between points on standard gauge tracks within the Reservation, for which the Contractors and/or their assigns, including the Fort Benning Railroad, as the case may be, shall receive, for all the intra-Reservation service on standard gauge tracks as herein contemplated, the sum of One Thousand Dollars ($1,000.00) per month by the designated Finance Officer.

(5) The Contractors, or their successors, or assigns, further agree that no charge shall be made for storage or demurrage in connection with shipments of freight to or from the Government, or detention of railway equipment by or for the Government, nor for track storage of Government-owned rolling stock.

(6) The Contractors or their successors or assigns further agree to procure from connecting lines and furnish the Government, upon request of the contracting officer, any rolling stock required for return loading.

(7) All traffic destined to Fort Benning or originating thereat destined to points on the Central of Georgia Railway, or Seaboard Air Line Railway, or other lines, shall be handled with dispatch by the Contractors, or their successors or assigns on such schedule as may be approved by the contracting officer, and, whenever directed by the contracting officer, the Contractors, or their successors or assigns, shall furnish such additional freight and express and or passenger service as the contracting officer may require.

(8) This operating contract with all its covenants and agreements shall remain in full force and effect until June 30, 1933, and unless terminated, as hereinafter provided, it may be annually renewed thereafter by written notice to the Contractors, or their successors or assigns, at the option of the United States as long as the needs of the public service may require, so as to give the United States continuous service, not extending, however, beyond June 30, 1937, but no renewals shall be made to include more than one fiscal year. Such written notice shall be served upon the carrier by any representative of the contracting officer on or before the first day of the fiscal year in which such renewal is to be effected unless the appropriation for that year be then not yet approved, in which event any such notice served within ten days after the approval of the current appropriation act shall operate to and with the same effect as though served on or before the first day of such fiscal year.

[fol. 224] (9) The Government will permit the use by the Contractors of two steam locomotives, and/or such other standard gauge rolling stock and equipment as may from time to time be designated by the Commanding Officer, Fort

Benning, and also the use, in common with the United States, of shops, shop machinery and other shop facilities and of the water supply necessary for use in the operation of said locomotives, at no expense to the United States, however; and Provided that any cost incident thereto shall be promptly reimbursed the United States by the Contractors on demand being made therefor.

The locomotive and other standard gauge rolling stock and equipment shall in no event be operated further distance than the points of junction and inter-change with the Central of Georgia Railway and the Seaboard Air Line Railway, respectively.

Any damage done to the locomotives incident to their use and operation by the contractors shall be promptly repaired to the satisfaction of the Commanding Officer; provided that if same be damaged beyond repair, lost or destroyed, the Contractors shall either replace the damaged, lost or destroyed property with like property of an equivalent value as determined by the Commanding Officer, or at the option of the Commanding Officer, pay the money value or such damage as thus determined to the United States on demand; provided further, that the accepted valuation of the locomotives shall be Ten Thousand Dollars ($10,000.00) each, with a depreciation of two per cent (2%) per annum from the effective date of this contract.

(10) The Contractors further agree for themselves, their successors, or assigns, that the United States shall not be responsible for any injuries to persons or damages to property incident to the operation and rendition of services under this operating contract, and the Contractors, their successors or assigns, shall save the United States harmless from any and all such claims.

(11) No crew or personnel of the United States shall be furnished to the Contractors, their successors or assigns, in connection with the rendition of the services required of the Contractors, their successors or assigns, by this operating contract.

(12) This operating contract shall not be transferred or assigned without the approval in writing of the contracting officer.

(13) This operating contract may be cancelled at will by the United States, and also may be terminated by the Contractors, their successors or assigns, by giving sixty (60) [fol. 225] days notice in writing to the contracting officer.

(14) The Contractors, their successors or assigns, shall furnish a performance bond in the penal sum of Ten Thousand Dollars ($10,000.00), conditioned upon the faithful performance of all the provisions of this operating contract.

(15) No member of or delegate to Congress or resident Commissioner shall be admitted to any share or part of this operating contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this operating contract if made with a corporation for its general benefit.

(16) The Contractors warrant that they have not employed any person to solicit or secure this operating contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractors for the purpose of securing business.

(17) Except as otherwise specifically provided in this operating contract and renewals thereof, all disputes concerning questions of fact arising under this contract and each renewal thereof, shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the Contractors, their successors or assigns, within thirty (30) days to the head of the department concerned, whose decision shall be final and conclusive upon the parties hereto as to such questions of fact. In the meantime, the Contractors, their successors or assigns, shall diligently proceed with performance.

(18) (a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, or his assistant.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

[fol. 226] In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

The United States of America, by J. H. Mellon, Major Q.M.C.

Two witnesses: Mary Harriss. Shelby Bensley.

H. A. Page, Jr., C. F. Harris, Contractors.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, H. A. Page, Jr., and C. F. Harris, who signed this contract had authority to execute the same.

J. H. Mellon, Contracting Officer, Major, Q.M.C.

(b) Return to Questionnaire

The Fort Benning Railroad Company having made application to the Interstate Commerce Commission under Paragraphs (18) to (21), inclusive, of Section 1 of the Interstate Commerce Act, for a certificate of public convenience and necessity for the acquisition and operation of a line of railroad extending from Fort Benning, a point within the Fort Benning Military Reservation, to connections with the Seaboard Air Line Railway and the Central of Georgia Railway at Fort Benning Junction, Georgia, which application is filed in the office of the Commission in Finance Docket No. 9709, hereby affirms that notice of the application has been published in the form prescribed by the Commission, at least once during each of three consecutive weeks, in the Columbus Ledger, beginning November 8, 1932, which said newspaper is of general circulation in the Counties of Chattahoochee and Muscogee in the State of Georgia, which are all of the states and counties in which the line of railroad proposed to be acquired and operated is situated, and that the newspaper clipping hereto attached contains a true copy of the notice as published in said newspaper, and as posted on the bulletin board in the Court House in Chattahoochee County. The applicant also submits the following information required by the Commission:

[fol. 227] Question 1: The essential facts relied upon to support the statement that the applicant is a carrier by

railroad, engaged in the transportation of passengers or property, subject to the Interstate Commerce Act, or is a corporation organized to construct and operate a railroad.

Answer 1: Applicant is not at present a carrier by railroad engaged in the transportation of passengers and property subject to the Interstate Commerce Act, but is a corporation organized under the laws of the State of Georgia for the purpose of engaging in the transportation of persons and property, subject to the Interstate Commerce Act, under a charter which contains the following provisions:

"For the purpose of constructing, equipping, maintaining and operating a railroad from Fort Benning Junction on the line of the Central of Georgia Railway in Muscogee County, running in a general direction nearly south to a point in Chattahoochee County, located within the U. S. Government reservation known as Fort Benning, said point of terminus being in said Chattahoochee County, approximately 6½ miles south from said Fort Benning Junction; and to exist for a period of 101 years, with the right to reconstruct, repair and maintain in connection therewith such switches, sidetracks and other transportation facilities as to said corporation may seem advisable."

Question 2: Whether the proposed new line of railroad will be both constructed and operated by the applicant.

Answer 2: The applicant does not propose to construct a new line of railroad, but to acquire and operate an existing line of railroad owned by the United States Government, extending from connections with the Central of Georgia Railway and the Seaboard Air Line Railway at Fort Benning Junction, Georgia, to Fort Benning, Georgia, a point within the Fort Benning Military Reservation of the United States Army, in accordance with the provisions of the lease and operating contract attached to the application herein as Exhibits "A" and "B", respectively. All of this pursuant to provisions of the operating contract reading in part as follows:

"(1) That the Contractors will promptly organize a railroad corporation to which their rights will be assigned if, when and as approved by the Government subject to the conditions herein set forth, which corporation will be known as the Fort Benning Railroad, which will, when, and sub-

ject to, a certificate of convenience and necessity to engage in interstate commerce is granted and made effective by the Interstate Commerce Commission, operate as a common carrier under and in obedience to and pursuant to the laws of the United States and of the State of Georgia and hold itself out to render under appropriate freight tariffs such [fol. 228] common carrier freight service thereunder as may be required not only to the Government but also to its officers and its men and to Government and private contractors and to all other shippers and receivers of freight and to the public generally as may be required to and from the inhabited portion of the Fort Benning Military Reservation now known as Fort Benning and hereafter to be designated as the station of Fort Benning."

Question 3: Whether or not any corporation, individual, or trustee, holds control over the applicant at the date of filing this return. If control is so held:

(a) the form of control, whether sole or joint, and whether in trust.

(b) the name and business address of the controlling corporation, individual, or trustee.

(c) the manner in which control was established.

(d) the extent of control.

(e) whether control is direct or indirect.

(f) the name and business address of the intermediary through which control, if indirect, was established and is exercised.

(g) the name and business address of the beneficiaries for whom the trust, if any, is maintained.

(h) the purposes of the trust.

Answer 3: The control of this corporation rests in its incorporators or stockholders, who are as follows:

Name	Shares Subscribed For
Rhodes Brown	1
H. Dixon Smith	1
C. F. Harris	31
H. A. Page	1
G. W. Page	61
J. R. McQueen	1
G. J. Burney	1
J. D. Frunk	1
Henry A. Page	1
Jennie S. Harris	1

Question 4: Whether the applicant is connected by common stock ownership, or otherwise, with any industry to be served by the proposed line. If so, state the facts.

Answer 4: The applicant is not connected in any manner with any industry to be served by the railroad.

Question 5: Amount and kind of capital stock (a) authorized, and (b) issued, for construction of the proposed line.

Answer 5: (a) Capital stock authorized by the applicant's charter is $10,000.00, but no capital stock has as yet been issued or authorized by the Interstate Commerce Commission.

(b) The line is already constructed.

[fol. 229] Question 6: The chief purposes and functions of the proposed line.

Answer 6: The chief purpose and function of the line in question will be to furnish improved railroad service to Fort Benning, Ga., and the Fort Benning Military Reservation, a large permanent Army Post. This will include common carrier railroad service for the Government, for officers and men and their families, for contractors and licensees, and for the general public.

Question 7: The classes of service to be performed, as passenger, freight, express, and switching.

Answer 7: The classes of service to be performed are freight, passenger, express and switching.

Question 8: The kind of motive power to be used. If electric power, state source and estimated cost.

Answer 8: Steam.

Question 9: Whether the proposed line will receive material revenue from the territory traversed, or serve any material public convenience and necessity of the local territory. If the answer is "no", the applicant may elect to omit answers to questions 10 to 21, inclusive.

Answer 9: The applicant expects to receive most of its common carrier revenue from traffic originated in or destined to Fort Benning, Ga., or the Fort Benning Military Reservation; and therefore will be devoted principally to serving the public convenience and necessity of the local territory.

Question 10: The name and population of each county in which the proposed new line of railroad will be situated, and the name and population of each city, town and village

at which a station will be established, together with its distance from a designated initial point, with the source of information as to population.

Answer 10: The counties in which this railroad is located are Chattahoochee and Muscogee, the population of which, as given by the 1930 census, is 8,894 and 57,558, respectively.

Fort Benning Junction, Ga., is simply the point of connection with the Central of Georgia Railway and the Seaboard Air Line Railway and the population is negligible. It is not intended to establish a station building there.

Fort Benning, Ga., is the inhabited center of the Fort Benning Military Reservation, and its population is made [fol. 230] up principally of officers and men of the United States Army, their wives and families, and civilian employees and their families. This population is now between 7,500 and 8,000, the figures being furnished in a letter from the Camp Quartermaster hereto attached as Exhibit "D".

The station of Fort Benning, Ga., will be about 6.8 miles from Fort Benning Junction, Ga.

There are additional people outside of, but living in the vicinity of, the Fort Benning Military Reservation who may find it convenient to ship and receive freight through the Fort Benning station, but no figures as to their number are available.

Question 11: The names of places mentioned in paragraph 10 that are now served by common carriers (exclud ing street railways), and the name of each common carrier serving the several places.

Answer 11: Fort Benning Junction, Ga., is the only place touched by this railroad which is now served by other common carrier railroads. Fort Benning Junction is merely the point of junction; and the other railroads there are (a) Central of Georgia Railway and (b) Seaboard Air Line Railway.

Question 12: The names of the places mentioned in paragraph 10 that have no common carrier service, giving the distance in miles of each such place from the nearest station on a common carrier, together with the name of each such carrier, and the character of the connecting highway.

Answer 12: Fort Benning, Ga., now has no common carrier service, and the nearest station on a common carrier

railroad is Fort Benning Junction, on the Central of Georgia and the Seaboard Air Line railways.

The character of the connecting highway is hard-surfaced. However, the highway is not, and cannot be, a substitute for railroad transportation.

Question 13: The name and population of each city, town and village (together with state and county in which located) having a population of 200 or more and lying within 10 miles of the proposed new line of railroad, but not entered thereby.

Answer 13: The name and population of each city, town and village having a population of 200 or more and lying within ten miles of this railroad, but not entered thereby, are:

[fol. 231] The nearest city to Fort Benning is Columbus, Ga., with a population of about 43,000, which city is not entered by this railroad.

Question 14: The approximate distance in miles by highway from the nearest station on the proposed new line of railroad to each of the places enumerated in paragraph 13, and the names of all common carriers, if any, now serving each.

Answer 14: Columbus, Ga., is served by the Central of Georgia, the Seaboard Air Line, and the Southern Railways, and is about ten miles distant from Fort Benning by highway.

Question 15: The names of other common carriers with which the proposed new line of railroad will connect, and the proposed points of track connection.

Answer 15: This railroad will physically connect with both (a) the Central of Georgia Railway and (b) the Seaboard Air Line Railway at Fort Benning Junction, Ga.

Question 16: The general topography of the country through which the proposed new line of railroad will extend, indicating whether level, rolling, mountainous, cultivated, pasture, prairie, desert, rocky, timbered, or underlaid with minerals.

Answer 16: The general topography of the country through which this line runs is level and rolling, and is partially cultivated and pastured.

Question 17: The approximate area of the territory to be served, an estimate of the population therein, and of the area

(1) in timber
(2) in pasture, and
(3) under cultivation. (See General Instructions)

Answer 17: The Fort Benning Military Reservation comprises an area of 98,000 acres, and while some of that area is timbered, and some is in meadow land, etc., it is all devoted to military purposes, so this question is not applicable.

The area outside of the Reservation which will be served is comparatively unimportant.

Question 18: The kinds of industry carried on in the area to be served, such for example, as farming, dairying, grazing, coal mining, manufacturing, lumbering, etc., and the relative importance of each.

Answer 18: This question is not exactly applicable. However, the principal activities are those connected with [fol. 232] the military training and preparation by and for the United States Army. This includes the subsistence needs of some 7,500 to 8,000 persons, together with munitions, coal, and other supplies required by the Reservation; and the necessary materials for construction purposes, etc.

Question 19: The main facts as to the age, growth and extent of such industries, their probable future growth and permanence and the reasons therefor.

Answer 19: Not applicable. See Answer 20.

Question 20: What carriers now serve these industries, and to what extent:

Answer 20: There is no common carrier service in and out of Fort Benning at present, as the nearest common carrier railroads are the Central of Georgia Railway and the Seaboard Air Line Railway at Fort Benning Junction.

It is understood that at one time both the Central of Georgia Railway and the Seaboard Air Line Railway handled traffic to Fort Benning Junction for the Fort Benning Military Reservation, but later the Central of Georgia undertook the operation of the railroad between Fort Benning Junction and Fort Benning and excluded the Seaboard Air Line from participation therein.

In any event, neither the Central of Georgia nor the Seaboard Air Line Railway now reach Fort Benning, Ga., and the nearest point of contact for both of them is outside the Reservation at Fort Benning Junction.

A major purpose which the applicant expects to serve is to provide a common carrier connection to and from Fort Benning with both the Central of Georgia Railway and the Seaboard Air Line Railway at Fort Benning Junction.

Question 21: Whether the chief support of the proposed new line of railroad will come from the general community or from some particular industry or industries, located or to be located. In the latter case give facts concerning such particular industry or industries and applicant's contractual or financial relation thereto.

Answer 21: The chief support of the line to be acquired will be derived from traffic moving to and from Fort Benning. This traffic will not only include that moving on Government bills of lading but also property transported on commercial bills of lading to and from officers, enlisted men and civilians, contractors and licensees located at the Post or on the Reservation. Also common carrier service will be held out to the general public living adjacent to the Reservation.

[fol. 233] Question 22: Whether the proposed new line of railroad will be built primarily for a direct profit from railway operation, or for the advantage of any other industry or business. If for the latter, state what industry or business will be so benefited, what such advantages will be, and the applicant's contractual or financial relation to such industry or business.

Answer 22: From applicant's point of view the railroad will be operated for a direct profit from railroad operation.

From the point of view of the War Department, however, the railroad will be operated for the greater convenience and necessity to the United States Army.

The railroad in question has in the immediate past been operated by the Central of Georgia Railway exclusively in connection with its own line, and subject to arbitraries which the Cgntral of Georgia Railway has imposed upon all traffic moving to or from the Fort Benning Military Reservation. Applicant will seek to eliminate all arbitraries and to extend to the Fort Benning Military Reservation the benefit of the through routes now in effect to Fort Benning Junction, Georgia, in order to place the Federal Government upon the same freight rate basis as is customarily accorded to commercial industries of similar size and importance throughout the country.

The acquisition and operation of the line in question in the manner provided in the lease from the Secretary of War will give the Military Reservation the benefit of service by an independent local carrier connecting *both* with the Seaboard Air Line Railway and the Central of Georgia Railway, thus affording Fort Benning a very superior service in connection with two competing trunk line routes, with its accompanying military advantages.

Applicant has no contractual or financial relations with the Fort Benning Military Reservation or any industry or business connected therewith outside of the lease and operating contract which accompanied the original application as Exhibits "A" and "B", respectively.

Question 23: If the proposed new line of railroad is an extension of an existing railroad, branch, connecting track or cutoff, in so far as not fully set forth under paragraphs 21 and 22, the extent to which it is expected to be directly profitable in itself, and the extent to which it is expected to be justified by its effect on the business of the existing line.

Answer 23: This line is not an extension, branch, connecting track or cut off for any other line.

[fol. 234] It is expected to be directly profitable in itself. It will take nothing from the total tonnage of the nearest existing common carriers, and may add something to the total tonnage volume.

Question 24: If the proposed new line of railroad is to be a connecting link between existing railroads, the kind and volume of traffic, expressed in tons or carloads, that probably will be interchanged.

Question 25: What economies will be effected by such interchange of traffic?

Question 26: Of the interchange traffic mentioned in answer to paragraph 24, what part, expressed in tons or carloads, cannot be hauled or moved between common points by existing railroads?

Answers 24, 25 and 26: The proposed new line of railroad will not be a connecting link between existing railroads.

Question 27: The facts as to any agreement, tentative or otherwise, with existing carriers, covering operation of the proposed line, interchange of traffic, division of rates, or trackage rights.

Answer 27: The Seaboard Air Line Railway has assured the applicant that when it is granted a certificate of public convenience and necessity to operate as a common carrier, it will establish a full line of through rates and divisions.

It is expected that through rates and divisions will also be established in connection with the Central of Georgia Railway.

No agreement, tentative or otherwise, has been made with reference to trackage rights or other physical operations.

Question 28: Whether any aid, gift, grant or right of way, or other donation has been promised in connection with the proposed new line of railroad, and if so, the names of all persons, natural or artificial, giving such aid, gift, grant of right of way, or other donation, with a statement of the nature and value thereof.

Answer 28: No aid, gift, grant or right of way or other donation has been promised by any person, natural or artificial, in connection with the line of railroad.

Question 29: The manner in which it is proposed to finance construction and equipment, the kind and amount of securities to be issued, and the approximate terms of their sale; to what extent funds for financing are now available, and which, if any, of such securities will be underwritten by industries to be served by the proposed line.

Answer 29: Most of the railroad and equipment is [fol. 235] owned by the United States Government and therefore no considerable financing is necessary for construction and equipment.

It is contemplated that an application will be filed with the Interstate Commerce Commission for authority to issue common stock of $10,000 for working capital and other purposes.

Question 30: An estimate, in detail, of the character and volume of traffic expected and the gross revenue to be derived therefrom, covering each of the first five years following the completion of the proposed new line of railroad, together with an estimate of the annual revenues expected after the first five years. The detailed estimate required

for the first five years should show the amount of each class of traffic, the mean length of haul, the rate per unit, and the revenue to be derived. Chief points or territories of origin and chief points or territories of destination of traffic.

Answer 30: The novelty of this situation is such that it is impracticable to give such an itemization as this question contemplates, for the reasons which are apparent under all the circumstances, but the following will probably supply the information needed:

It is certain that the building program at Fort Benning will, of necessity, be continued. This will involve at least five years more work, with an average expenditure, judging by the past several years, of approximately a million dollars per year. By the end of the five-year period, most of this construction will be completed. Even without the traffic resulting from the building program, enough regular traffic now moves to and from the Fort to insure enough revenue to meet all operating expenses, with a fair profit over. As the construction continues, these additions themselves, will periodically increase the usual and normal movement of traffic, as the entire size and scope of the Government's activities are enlarged. By the time the permanent construction is completed the extent of the operations at the Fort will have also become so much larger that applicant believes it is a reasonable assumption to state that as much traffic will move after the first five-year period as during that time.

The character of the traffic to be handled is the usual traffic in connection with an Army Post of the size of Fort Benning, Georgia. It consists of various kinds of construction material for the construction of roads and the various buildings required at the Army Post, munitions, coal, food, supplies, etc.

[fol. 236] Question 31: The estimated total gross revenue, operating expenses, net revenue and net railway operating income, corresponding with the estimates of traffic under paragraph 30. By "net railway operating income" is meant the excess of the credits over the debits to income, as reflected by the operating revenue, operating expense, railway tax accrual, uncollectible railway revenue, equipment rent, and joint facilities rent accounts.

Answer 31: Applicant is confident that net income in the following estimate will be realized, and, if anything, it errs on the side of conservatism:

Estimated total gross income:		
From common carrier operations		$43,000.00
From non-common carrier intra-plant operations		12,000.00
		$55,000.00
Operating expenses		36,000.00
Net revenues		$19,000.00
Railway tax accruals		1,000.00
		$18,000.00
Deductions from gross income:		
Hire of freight cars	$4,000.00	
Other expenses	1,000.00	
	5,000.00	
Net income		$13,000.00

Question 32: The part of the estimated traffic which will constitute net additional business developed or created by the construction of the proposed new line of railroad, and the part that will be diverted from existing railroads.

Answer 32: The amount of actually new business which will be developed or created will probably be considerable, perhaps five hundred carloads of low-class commodities, such as brick, tile, gravel and sand, now being trucked in on account of the arbitraries heretofore charged. Removal of arbitraries will increase the movement by rail, and connecting railroads will benefit thereby.

The main justifications for the common carrier operation of this railroad are to be found primarily in the public convenience and necessity which will be served by making available to the United States Government (a) more efficient and satisfactory local common carrier facilities; (b) the considerable monetary savings which will result to the Government from the establishment of through rates and divisions to and from Fort Benning; (c) the advantage of two competing trunk lines to and from the point of con-

nection with this applicant; and (d) the strategical military advantage of having better railroad outlets and inlets for [fol. 237] troop concentrations and movements for the National defense in times of emergency.

Question 33: The particular mining, timbering, manufacturing, or other enterprises to be established contingent on the construction of the proposed new line of railroad and applicant's contractual or financial relation thereto. The tonnage or number of cars of freight expected from such enterprise.

Answer 33: Not applicable.

Question 34: The dates on which it is expected to begin and to complete the construction of the proposed new line of railroad.

Answer 34: As the line of railroad is already constructed, this question is not applicable.

Question 35: The engineering work in full detail which has been done with respect to the proposed line at the time of filing this return.

Answer 35: As the line of railroad is already constructed, no further answer is necessary.

Question 36: The following particulars as to the physical characteristics of the proposed new line of railroad:

(a) The number of main line tracks.

(b) Weight of rail for main line track.

(c) Rate of maximum grade in each direction, and whether and how compensated for curvature.

(d) Rate of limiting grade that will fix train loading in each direction, and whether and how compensated for curvature.

(e) If helper grades are to be used, the number, rate, length and location of each.

(f) The maximum rate of curve.

(g) The average amount of curvature per mile, in degrees.

(h) The approximate length and height of wooden trestles or other temporary construction.

(Details under this paragraph not fixed by survey are to be estimated from reconnaissances so far as possible.)

Answer 36: The information required in response to Question 36 is contained as footnotes on map exhibit "C"

attached to the application herein, and attention is directed thereto.

Question 37: An estimate of total increase in charges to road and equipment account during the first five (5) years after completion of the line. If this displaces rental charges on equipment, so show.

[fol. 238] Answer 37: Not applicable.

Question 38: Any additional facts or reasons to show that the public convenience and necessity require the construction of the proposed line.

Answer 38: Not applicable, but the public convenience and necessity which require the common carrier operation of this line are obvious from the several preceding answers.

Exhibits

Inasmuch as the line of railroad in question is already constructed, none of the exhibits required in connection with new construction are applicable. There is attached hereto, however, as Exhibit "E", a map showing the Fort Benning Railroad and its connections in relation to other railroads and nearby cities.

City of Washington,
District of Columbia, ss:

H. A. Page, Jr., makes oath and says that he is the President of Fort Benning Railroad Company, applicant herein; that he has been authorized by proper corporate action on the part of said applicant to verify and file with the Interstate Commerce Commission the foregoing return to questionnaire of said Commission in respect of the application in Finance Docket No. 9709; that he has carefully examined all of the statements referred to in said return and the exhibits attached thereto and made a part hereof; that he has knowledge of the matters set forth in such return and that all such statements made and the matters set forth therein are true and correct to the best of his knowledge, information and belief.

(Signed) H. A. Page, Jr.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 2nd day of December, 1932. (Signed) Mary G. Kite, Notary Public, D. C. My commission expires: July 3, 1934. (Seal)

Exhibit "D" to Return to Questionnaire

[fol. 239] Headquarters the Infantry School

Office of the Quartermaster, Fort Benning, Georgia

Address all replies to Post Quartermaster, Fort Benning, Ga.

November 28, 1932.

Page and Harris, Fort Benning, Ga.

GENTLEMEN:

The Fort Benning Military Reservation consists of approximately 98,000 acres, located in Muscogee and Chattahoochee Counties, Georgia, with a population of between 7,500 and 8,000 officers and their families, enlisted men and their families and civilian employees and their families. Approximately 1,000 head of stock, horses and mules, are stabled at Fort Benning. The Infantry School and the Tank School are both at Fort Benning. Fourth Corps Area annual maneuvers, R.O.T.C., and O.R.C. camps are held annually at this station. The annual turn-over of officers and enlisted men at this station consists of the following: Approximately 300 officers with dependents leaving annually; 300 officers with dependents arriving annually; 240 officers, including National Guard and Organized Reserves, reporting annually without dependents; 240 officers without dependents departing annually; 60 enlisted men of the National Guard and Organized Reserves reporting annually; and 60 enlisted men of the National Guard and Organized Reserves departing annually. The in and outbound freight at this station will approximate 2800 carloads per year, consisting of gasoline, oil, coal, ammunition, clothing and equipage, subsistence, impediments, and household goods, in addition to building material for contractors used in connection with erecting permanent buildings. A large amount of construction will be done during the next twelve months. The construction program extends through 1940. About one-half of the inbound shipments are moved on government bill of lading, the balance being moved on commercial bills of lading.

Very truly yours, (Signed) J. De Camp Hall, Colonel, Q.M.C. Quartermaster.

[fol. 240] (c) PETITION OF CENTRAL OF GEORGIA RAILWAY COMPANY FOR LEAVE TO INTERVENE

Comes now your Petitioner, Central of Georgia Railway Company, and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding, and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention, says:

1. Petitioner is a common carrier engaged in the transportation of passengers and property wholly by railroad between points in the States of Georgia, Alabama, and Tennessee, and other States, and as such common carrier is subject to the provisions of the Interstate Commerce Act. Petitioner's railroad connects at Fort Benning Junction with the railroad which extends thence to Fort Benning Military Reservation, and which is owned by the United States.

2. Petitioner operated the line from Fort Benning Junction to Fort Benning from June 15, 1924, to November 17, 1932, under a revocable license from the Secretary of War dated April 21, 1924, which license was revoked by the Secretary of War effective November 17, 1932, a copy of which license is hereto attached marked "Exhibit A".

3. Under the aforesaid license, Petitioner was required to keep and maintain the tracks and the bridge across Upatoi Creek in good order and repair, and was required to construct and maintain a suitable freight and passenger depot at Fort Benning, to establish and maintain an express agency at the Fort, and to place all inbound freight at such points on the railway and at such warehouses and other places within the Reservation as might be designated, without switching charge or other expense to the United States.

4. Prior to the granting of said license to Petitioner, the Military Authorities at Fort Benning did all the switching services between Fort Benning Junction and the Fort. Under an arrangement with the War Department, Petitioner operated passenger service into the Fort from November 2, 1919, until on or about April 10, 1929, and thereafter until said license was revoked, petitioner fur-

nished to Fort Benning express and baggage service via motor trucks.

5. When Petitioner took over the operation of the Fort Benning line, it was very much run down. Petitioner incurred large expenses in rehabilitating it, especially in [fol. 241] cross-tie renewals and in tie plates and gauge rods to strengthen the track. In addition to which, Petitioner spent in Additions and Betterments to the Fort Benning line up to January 1, 1932, the sum of $17,234.73, of which the sum of $13,623.56 was spent in constructing the freight and passenger depot and track appurtenant thereto.

6. The tracks of the Seaboard Air Line Railway Company were connected with the Fort Benning line at Fort Benning Junction when the revocable license was granted to Petitioner, effective June 15, 1924, but shortly thereafter the Seaboard Air Line Railway Company voluntarily removed its connecting track, and has had no physical connection with the Fort Benning line since its connecting track was removed.

7. Petitioner all during the time it was operating the Fort Benning line, received no complaints as to the service furnished (except in the one instance hereinafter set forth). Petitioner had at all times furnished excellent and satisfactory service. Nor was any complaint made that the rates charged were too high or in any respect unsatisfactory. A few days prior to September 17th, there was called to the attention of Petitioner an advertisement in the Columbus, Georgia, newspaper of a petition for a charter for a railroad to be known as "Fort Benning Railroad Company", the incorporators being certain persons from North Carolina, among them Henry A. Page, of Aberdeen, North Carolina, and H. A. Page, Jr., of Wilmington, North Carolina, and C. F. Harris, of Fayetteville, North Carolina, the said persons being in the main the persons who are connected with or interested in the Cape Fear Railroad, which operates into the Fort Bragg Military Reservation. This was the first intimation Petitioner had from any source that a change was contemplated in the operations of the Fort Benning line. Petitioner, upon inquiry at the War Department, was informed by General Williams that its license was to be revoked because its service

was unsatisfactory and that application should be made at Fort Benning for particulars.

Upon inquiry at Fort Benning, it developed that the only charge of unsatisfactory service was that between November 18, 1931, and February 26, 1932, Petitioner had discontinued the operation of the engine which went out to the Fort in the afternoon only for the purpose of hauling from the Fort any freight which might then be ready for shipment, principally less than carload shipments. It further transpired that on January 30, 1932, the Authorities [fol. 242] at Fort Benning recommended to the War Department that Petitioner's license should be cancelled for unsatisfactory service. This recommendation was made on the advice of Captain S. D. Campbell, who was assigned to the Quartermaster's Department at Fort Benning.

Petitioner was not advised that any such recommendation had been made to the War Department, and did not know of it until a day or two before it received notice of the revocation of its license. The revocation of Petitioner's license was made out on September 2, 1932, and is dated at the top "September 16, 1932", and was received by Petitioner September 17, 1932, effective thirty days thereafter. It will be observed that the cause of the alleged unsatisfactory service was removed February 26, 1932, more than six months before the War Department decided to revoke the license. The lease of the Fort Benning Railroad made to H. A. Page, Jr., and C. F. Harris, a copy of which is attached to the petition, shows on its face that it was executed by the Assistant Secretary of War on September 9, 1932. The alleged unsatisfactory service which was given to Petitioner as the reason for the revocation of its license, was no reason at all, but was merely an excuse. Petitioner has recited these facts to show that this whole matter was conducted secretely, without any regard to Petitioner's rights, and that Petitioner never had any opportunity to meet the views of the War Department in the matter of rates, or in any other matter.

8. Fort Benning Railroad Company owns no railroad, or railroad property or equipment (except the depot at Fort Benning, which it has agreed to buy from Petitioner for $3,000 and on which it has paid $500 on account), and

it pays no taxes. It was organized for the purpose of operating the Fort Benning line for the Government.

9. The Revenues of Petitioner for the year ended August 31, 1932, from traffic transported over its own lines and the Fort Benning line were $136,570.38, and the tons hauled were 42,776. The proportion of said revenue accruing to the Fort Benning line was $21,541.31.

10. The proportional rates on traffic moving over the Fort Benning line which were in effect when the line was leased to Petitioner in 1924 are contained in Central of Georgia I. C. C. No. 2790, and were the rates agreed upon between the War Department and Petitioner as reasonable and just rates for the service performed. Some of said rates have been reduced and the rates in effect when Petitioner relinquished control of the line are contained in [fol. 243] Central of Georgia I. C. C. No. 2517.

11. The Fort Benning Railroad Company has agreed to put in effect through routes and joint line haul common carrier rates to and from Fort Benning as low or lower than the rates applied to Fort Benning Junction. If this situation had been in effect when Petitioner's license was in effect, it would have cut Petitioner's Revenues for the year ended August 31, 1932, the sum of $21,541.31.

12. The Receivers of Seaboard Air Line Railway have agreed to allow Fort Benning Railroad Company out of the through rate on coal 50 cents a ton, but if the coal moves via land grant railroads, as it would if it moved, for instance, from Louisville and Nashville, Alabama mines, the allowance to Fort Benning out of the through rate on coal, would figure 39 cents per ton. The Receivers of Seaboard Air Line Railway have also agreed to allow the Fort Benning Railroad Company out of the through rates on gas and fuel oil, 33⅓ per cent of the rate.

For the year ending August 31, 1932, the movement and revenue of coal, gas, and fuel oil, to Fort Benning was as follows:

Commodity	No. of Cars	Tons	Revenue
Coal	305	16,144	$18,404.14
Gas	134	3,692	17,500.08
Oil	56	1,722	4,494.42
Total	495	21,558	40,398.64

13. If the through rates to Fort Benning are made the same as to Fort Benning Junction, and Fort Benning Railroad Company is allowed the proportion out of the through rates which the Seaboard Receivers propose to allow the Fort Benning Railroad Company, the resultant loss on the three commodities of coal, gas, and fuel oil, figuring on the basis of the actual movement of these commodities for the year ending 1932, would be as follows:

Coal:	
Reduction by elimination Fort Benning Arbitrary	$968.64
Fort Benning Railroad Proportion	6,296.16
	$7,264.80
Gas:	
Reduction by elimination Fort Benning Arbitrary	$2,215.20
Fort Benning Railroad Proportion	5,094.96
	$7,310.16
Fuel Oil:	
Reduction by elimination Fort Benning Arbitrary	$861.00
Fort Benning Railroad Proportion	1,211.14
	$2,072.14
Total revenue coal, gas, and fuel oil	40,398.64
Less Reduction, above	16,647.10
Balance	$23,751.54

[fol. 244] Thus the result of making the through rate to Fort Benning the same as to Fort Benning Junction, and the allowance of the proportion proposed by the Seaboard Receivers, would be to cut the revenue on these three commodities from $40,398.64 to $23,751.54, or a difference of $16,647.10. This amounts to a reduction in revenue of approximately 41%. Applying this percentage to the total revenue from all traffic for the year ended August 31, 1932, the total revenue of $136,570.38, would be reduced by $55,993.84.

14. In view of the public character of the Fort Benning Reservation and the public ownership of the Fort Benning line, it should not be treated as a common carrier and allowed to participate with connecting common carriers in through rates. The service on the Fort Benning line is essentially switching service and the line from Fort Benning Junction to the Fort and the tracks in the Reservation are together essentially a plant facility, and it is not in the public interest that the Fort Benning line should be treated as a common carrier.

15. If the War Department wishes competition between the Seaboard Air Line and Petitioner, the War Department can at any time connect the Fort Benning line with the Seaboard tracks at Fort Benning Junction, and provide that for routing purposes Fort Benning shall be regarded and treated as a local station of both lines.

Petitioner is willing and ready to make an equitable arrangement with the War Department with reference to rates and to the operation of the Fort Benning line, and the switching of the tracks at the Fort.

16. Petitioner prays that the Certificate of Public Convenience and Necessity applied for by Fort Benning Railroad Company may be denied for the following reasons and on the following grounds:

(a) The Fort Benning line is public property and essentially a switching proposition and a plant facility, and, therefore, should not be given the status of a common carrier and allowed to participate as a common carrier in through rates to Fort Benning.

(b) Fort Benning Railroad Company owns no railroad or railroad property or equipment, pays no taxes, and should not be given the status of a common carrier and permitted to participate as a common carrier in through rates.

(c) There is no public convenience or public interest in- [fol. 245] volved in allowing the Fort Benning Railroad Company to profit out of the through rates to Fort Benning, and thus reduce the revenues of either Petitioner or the Seaboard Air Line. It is contrary to the public necessity and convenience that the War Department should be allowed to make the proposed arrangement with the Fort Benning

Railroad Company and give it the status of a common carrier and put it in the power of the Fort Benning Railroad Company to make a profit out of the carriers which operate up to Fort Benning Junction.

(d) The Fort Benning Railroad Company is purely a private enterprise for profit. It will not perform any common carrier service, but a purely switching service. It is not organized to promote the public interest. It is purely a plan or scheme to provide a profit at the expense of Petitioner and the Seaboard Air Line for a private contractor. Any and all service that will be or can be performed by Fort Benning Railroad Company can be better performed by Petitioner with its railroad facilities. It is not in the public interest that the revenues of either Petitioner or the Seaboard should be depleted by or through the proposed arrangement with Fort Benning Railroad Company.

Wherefore, Petitioner prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by Counsel upon brief, and at the oral argument, if oral argument is granted.

Dated at Savannah, Georgia, this 14th day of December, 1932.

Central of Georgia Railway Company, by (Signed) T. M. Cunningham, Vice President & General Counsel. P. O. Address: 26 Bryan St., E., Savannah, Georgia.

EXHIBIT "A" TO PETITION OF CENTRAL OF GEORGIA RAILWAY COMPANY FOR LEAVE TO INTERVENE

Central of Georgia Railway Company—Secretary of War

Contract No. 11395

April 21, 1924.

The Secretary of War, under and by virtue of the authority in him vested, has granted and by these presents does hereby grant to the Central of Georgia Railway Company, a corporation, a license, revocable at the will of the Secre-
[fol. 246] tary of War, to use and operate the standard

gauge railway tracks, switches and extension, including the railroad bridge across Upatoi Creek, belonging to the United States, constructed on the Fort Benning Military Reservation, and extending from Fort Benning to Fort Benning Junction, Georgia, and to build and maintain at Fort Benning, Georgia, a building or buildings of a temporary and removable type of construction suitable for freight and passenger depots, and to maintain offices therein.

This license is granted subject to the following provisions and conditions:

1. The said tracks, switches and extensions, except that portion of the track to the gravel pit which lies south of World Avenue and that portion of the track extending from the hay sheds to the roundhouse, shall be kept and maintained in good order and repair by the licensee and without expense to the United States. The track from World Avenue to the gravel pit and the track from the hay sheds to the roundhouse are to be maintained by the United States.

2. The railroad bridge across Upatoi Creek shall be kept in good order and repair by the Licensee and without expense to the United States.

3. The Licensee will construct and maintain at Fort Benning, on a site to be selected and approved by the Commanding General of the post, a building or buildings of a temporary and removable type of construction suitable for freight and passenger depots, the plans for which shall be submitted to and approved by The Quartermaster General.

4. The licensee will establish and maintain an express agency of the American Railway Express Company at Fort Benning, Georgia.

5. All inbound freight will be placed at such points on the railway and at such warehouses and other places within the reservation as may be designated by the officer in charge of such freight, without switching charge or other expense to the United States.

6. In case of emergency the licensee agrees to furnish such additional freight and passenger service as may be required by the United States.

7. No claims shall be made against the United States by the licensee for any damage to any property of the licensee on said reservation.

8. The licensee will protect the United States against any claim for personal injury or damage to property resulting from the operation by the lessee of its trains on the [fol. 247] Fort Benning Military Reservation.

9. The operation by the licensee of its trains over the tracks and other property mentioned in this license, and the maintenance of its depots and of its office therein, shall be subject to such rules and regulations in the interest of good order and military discipline as are now in force on the reservation, or as may from time to time be promulgated by proper military authority.

10. Upon the revocation or relinquishment of this license, the said licensee shall remove all buildings constructed by it, and other property which it may have on said reservation, and will return to the United States the said bridge, tracks, switches and extensions covered by this license in as good condition as they are in at the date of this instrument for use by the United States and upon its refusal or neglect to remove the same and to return said property in the condition aforesaid, the Secretary of War may cause such property to be removed at the expense of the licensee and no claim for damage against the United States or any agent or officer thereof shall be created by or on account of such removal.

11. Any sum which may have to be expended after the revocation or relinquishment of this license to restore said bridge, tracks, switches and extensions hereby authorized to be used by the licensee, to as good condition for use by the United States as they are in at the date of this instrument, shall be paid to the United States by the licensee on demand.

12. The licensee is authorized to use sufficient sand, gravel, rock and earth from the military reservation to maintain the Government-owned tracks, which by the terms of this license it is authorized to use, but is prohibited from removing such material or any other Government-owned property from the reservation for the maintenance of any tracks owned by the licensee.

In Witness Whereof, this license has been executed this twenty first day of April, 1924.

Dwight F. Davis, The Assistant Secretary of War.

This License is accepted by the licensee, subject to the provisions and conditions contained therein, this 15th day of June, 1924.

Central of Georgia Railway Company, L. A. Downs, President.

[fol. 248] (d) Order of the Commission of December 15, 1932, Allowing Central of Georgia Railway Company to Intervene

Upon consideration of the record in the above-entitled proceeding and petition filed on behalf of Central of Georgia Railway Company for leave to intervene herein:

It is ordered, That the said Central of Georgia Railway Company be, and it is hereby, permitted to intervene and be treated as a party hereto.

It is further ordered, That a copy of the intervening petition and of this order be served upon the applicant and Governor and Georgia Public Service Commission; and that a copy of this order be served upon each of the parties to this proceeding.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

(e) Intervention of H. D. Pollard, as Receiver of Central of Georgia Railway

Comes now your Petitioner, H. D. Pollard, as Receiver of Central of Georgia Railway, and respectfully shows that he has an interest in the matters in controversy in the above entitled proceeding, and desires to intervene and become a party to said proceeding and for grounds of the proposed intervention, says:

1. Petitioner was appointed Receiver of all the property and assets of Central of Georgia Railway Company by an order of the United States District Court for the Southern

District of Georgia, Savannah Division, December 19, 1932, in the equity cause of Alabama Fuel & Iron Company vs. Central of Georgia Railway Company; that Petitioner has duly qualified as such Receiver.

2. Central of Georgia Railway Company filed its intervening petition in the above stated matter, and on December 15, 1932, the application of Central of Georgia Railway Company to intervene was duly granted by the Commission.

[fol. 249] 3. The interests of Petitioner are identical with the interests of Central of Georgia Railway Company, and Petitioner adopts all of the allegations of the intervening petition of Central of Georgia Railway Company with the exception of the allegations of the 6th paragraph of the intervention, and with the exception of the allegation in the 12th paragraph of the intervention that the Seaboard Air Line Railway had agreed to allow Fort Benning Railroad Company out of the through rate on coal 50 cents a ton; and Petitioner also adopts the prayers of said intervention.

Wherefore, Petitioner prays leave to intervene and be treated as a party hereto, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by Counsel, upon brief, and at the oral argument, if oral argument is granted.

Dated at Savannah, Georgia, this 14th day of January, 1933.

H. D. Pollard, as Receiver of Central of Georgia Railway, by T. M. Cunningham, General Counsel, P. O. Address: 26 Bryan St., East Savannah, Georgia.

(f) Report and Order of Division 4 of the Commission Dated June 14, 1933

Division 4, Commissioners Meyer, Eastman, and Mahaffie

By Division 4:

Exceptions were filed to the report proposed by the examiner, and the case has been argued orally.

The Fort Benning Railroad Company, on November 5, 1932, applied for authority to acquire and operate a line

called the Fort Benning Railroad, extending from a point within the Fort Benning Military Reservation to Fort Benning Junction, 6.807 miles, in Muskogee and Chattahoochee Counties, Ga. Permission is requested to retain excess earnings. The Central of Georgia Railway Company, hereinafter called the Central, and H. D. Pollard, its receiver since December 19, 1932, intervened in opposition to the application. A hearing has been had. The Governor of Georgia advised that no objection would be interposed by the State. The Seaboard Air Line Railway Company and its receivers will be referred to as the Seaboard.

[fol. 250] Fort Benning, the seat of the infantry and tank schools of the army, and the inhabited portion of a military reservation embracing an area of approximately 98,000 acres and having a normal population of between 7,500 and 8,000, is about 10 miles from Columbus, Ga., and about 6 miles from closely parallel lines of the Seaboard and the Central passing through or near the point called Fort Benning junction, about 4 miles southeast of Columbus.

The Fort Benning Railroad is owned by the Federal Government and was built about 15 years ago to provide a rail connection between the military reservation and Fort Benning Junction. The Government-owned properties include about 3 miles of tracks within the reservation and certain equipment, shops, and other facilities.

For several years, following their completion, the properties were operated under army auspices. At the request of the Government, on June 15, 1924, operation of the main line was taken over by the Central under a license, revocable at will from the Secretary of War, hereinafter referred to as the Secretary, through his principal assistant. Under this arrangement the Central handled all cars moving to or from Fort Benning and spotted cars at various points within the reservation, but the army continued to do the intra-terminal switching. The Central spent about $31,000 for rehabilitation and improvement of the line and about $6,300 annually to maintain it. The former expenditures included $13,674 for a new station at Fort Benning, which the applicant has agreed to purchase for $3,000.

The rail traffic handled at the reservation included coal, gasoline and oil, ammunition, and other freight aggregating about 2,800 cars a year, mostly inbound, and, in addition, building material received by contractors for use in con-

structing permanent buildings under a program extending through 1940. To compensate it for the service rendered to, from, and at Fort Benning, and with the concurrence of War Department representatives, the Central established, on freight moving to and from the reservation, certain arbitraries over and above through rates applicable to Columbus and Fort Benning Junction. In the aggregate these additional charges have ranged from $20,000 to $25,000 a year. In return for a reduction in the arbitraries it was also agreed that Fort Benning might be made a local station on the Central's system, in order that it might enjoy the long haul on all the business.

Because its participation in the traffic was thus limited and because of the weakened condition of bridges on either side of Fort Benning Junction, the Seaboard ceased to use Hol. 2511 the connection with the Fort Benning Railroad, handling reservation freight in interchange with the Central at Columbus, and the Central removed the frog and switch from the connection of the line with its track in order to avoid operating risks and save maintenance charges. The bridges referred to were strengthened in 1928 or 1929. During the year ended August 31, 1932, the Seaboard's share of the Fort Benning traffic amounted to 2,008 tons, with revenues of $7,361. Its total gross revenues on all Fort Benning traffic handled in the calendar year 1931 were $2,520.

Whatever may be the merits of an extended colloquy in the record as to the service rendered by the Central, the fact remains that the military authorities were dissatisfied both as to the service and the rate situation. Consideration was given to various alternative methods of operation, including resumption of army operation, substitution of a new license with more specific terms, and operation similar to that in effect at the Fort Bragg Military Reservation, which had been found satisfactory. After an investigation of the situation in May or June, 1932, Henry A. Page, Jr., and C. F. Harris, sponsors of the operation at Fort Bragg, submitted a proposal which was considered a desirable solution of the problem and was duly transmitted to Washington for appropriate consideration.

On September 2, 1932, upon recommendation of the Fort Benning authorities, the Secretary revoked the Central's license, effective 30 days from the delivery of notice, and

since October 18, 1932, the main line and intra terminal tracks have been operated by Page and Harris, as private contractors, under an operating agreement dated October 16, 1932.

Under authority of an Act of Congress approved July 28, 1892, the Secretary has leased to the contractors the main line and all standard gage tracks in the reservation for a term of five years from October 18, 1932, at an annual rental of $100.

The applicant was organized under the laws of Georgia, with an authorized capital stock of $10,000, to take over the contractors' rights and obligations under the lease and operating agreement, and to operate the main line in common carrier service under appropriate freight tariffs. Under the operating agreement the contractors are permitted the use of two steam locomotives, other equipment, shop facilities and water supply at Fort Benning, and they receive $1,000 a month for the intra terminal switching and $5 for each loaded car moved to or from connections with the Central and the Seaboard. Thirty days after the appli
[fol. 252] cant has secured the authority herein sought, payments for the main line service will cease, it being expected that the applicant will be able to make arrangements with the trunk line carriers for divisions of through rates. The operating agreement is to remain in force until June 30, 1933, but thereafter may be renewed annually, at the option of the Government, until June 30, 1937. It may be canceled at will by the Government, and may be terminated by the contractors or their assigns on 60 days' notice in writing. It is contemplated that the applicant will seek authority from us to issue all its stock to provide funds for working capital and other purposes.

Under the contract the applicant will be bound to handle the freight to and from Fort Benning Junction with dispatch, on such schedule as the military authorities may approve, and furnish such additional service as they may require. The applicant is to undertake to establish rates to and from Fort Benning as low as the rates to the Junction.

Annual results of the proposed operation by the applicant are estimated as follows: Gross income, from common-carrier operations, $43,000, from intraplant operations, $12,000, total $55,000; operating expenses, $36,000, net

revenues $19,000, taxes $1,000, hire of freight cars $4,000, other expenses $1,000, and net income $13,000. The estimate of common-carrier earnings is based on the number of cars handled and other information obtained from the Central, and the estimate of expenses on the Cape Fear Railways' experience at Fort Bragg.

The advantages to the Government urged in support of the applicant's proposal are economies amounting to at least $20,000 a year through elimination of the arbitraries charged on the Fort Benning traffic, competitive service, more advantageous rates in some instances, and strategical military advantages through direct connection with the line of the Seaboard as well as that of the Central, and better service generally because of greater flexibility possible under operation of both the main line and the intra-terminal tracks by a local organization specializing in that service. It was testified that the present service is more satisfactory to the military authorities than that which had been obtained from the Central.

The applicant's proposal is favored by the Seaboard, which would prefer operation of the Fort Benning Railroad by a neutral connection rather than by a competitor. [fol. 253] The Seaboard witness believes that it will be advantageous to the Government to have the protection of direct connection with two railroads rather than one.

Although conceding that, in revoking its license, the Secretary was under no obligation to make any assignment of reasons, the interveners are critical of the omission of opportunity for them to negotiate with the military authorities or to bid for operation of the properties in competition with the contractors. These are matters not related to the present inquiry, for review of the Secretary's action is not within our jurisdiction.

The interveners contend that, after deduction of the agreed compensation for intra-terminal switching, the equivalent of the value of free use by the applicant of Government-owned equipment and other facilities, and the part of the arbitraries paid by civilian contractors, the saving to the Government from elimination of the arbitraries and the cost of army operation of the intra-reservation tracks will be negligible. As the record does not show the full cost of the former method of switching within the

reservation an adequate basis of comparison is not available.

The receiver is willing to make the same arrangements with the Government for operation of the railroad facilities at Fort Benning as proposed by the applicant, to dispense with the arbitraries heretofore applied between the junction and the fort, to make Fort Benning a common point on both trunk-line systems, charging the Seaboard only the cost of the service for switching to and from the junction and let the Government route the traffic as it sees fit. A witness for the interveners testified that there is nothing to prevent the receiver from giving service as good or better than proposed by the applicant.

The interveners further contend that the Fort Benning line is a plant facility and cite various decisions by us in support of the proposition that such properties should not be accorded common-carrier status; and that the contracts with Page and Harris are void under statutes requiring advertisement for bids for Government contracts and that we should not give them effect by issuing a certificate. While the facilities may have the physical aspect of a plant facility, the circumstances of their purpose and ownership clearly distinguish them from industrially controlled and operated railroad properties in the application of regulatory policies. If the contracts in question are void, a certificate herein can not have the effect of validating them. We can not undertake to pass on the legality of the con- [fol. 254] tracts, and responsibility in that matter must remain with the parties thereto.

The Seaboard has assured the applicant that it will establish a full line of through rates and divisions.

The interveners contend that it is unjust to require the same rates to the fort as to the junction because of the additional cost of transportation between those points, but that it will be necessary for them to follow the Seaboard's action or lose the traffic. Since testimony for the interveners shows that the arbitraries assessed against the Fort Benning traffic about equalled the cost of operating and maintaining the line, the loss of those revenues would be largely offset by the corresponding savings in expenses. The interveners' principal concern in the applicant's proposal is threatened adverse effect upon their earnings of

reductions in rates, division of rates with the applicant, and loss of traffic to the Seaboard.

In the year ended August 31, 1932, the Central hauled on the Fort Benning Railroad and its own system 42,776 tons of freight on which the system revenues amounted to $136,570. The revenue on coal, gasoline, and oil was $40,399. If, in that year, the arbitraries had been removed, and divisions of 38 cents a ton on coal and 33⅓ per cent of the rates on gasoline and oil had been allowed, as, the interveners contend, is contemplated by the Seaboard, the revenues from this traffic would have been reduced by $16,486, or about 41 per cent. If the total revenue had been reduced in the same ratio, the Central's loss of revenues would have amounted to nearly $56,000. Of this loss about 75 per cent would have resulted from the allowance of divisions on the basis stated.

Doubtless the Central's receiver can ill afford to lose any revenues, but that consideration also applies in the case of the Seaboard, and the interveners would not have just cause of complaint unless the applicant should indulge in practices calculated to deprive the receiver of equal opportunity to compete with the Seaboard for the traffic. This proceeding and record afford no basis for a finding as to the reasonableness of the through rates.

About half of the inbound freight moves on Government bills of lading. The War Department uniformly exercises the shipper's right to route, where possible, and its only interest in the present proposal is to secure adequate transportation at the least cost to the Government. It does not clearly appear that the applicant would be able to influence the routing of other traffic. But, if and when a situation arises under which traffic is diverted from the Central's [fol. 255] system because of unduly preferential divisions accorded to the applicant by the Seaboard, that matter may be corrected by us in an appropriate proceeding under section 15(6) of the interstate commerce act.

Some of the advantages claimed for the applicant's proposal are being realized under the present method of operation of the Fort Benning Railroad facilities. But this arrangement involves a cost to the Government of $5 for each loaded car moved to or from the reservation. Operation of the line by the applicant therefore would have the additional advantage of appreciably reducing Government

transportation costs and thereby be of benefit to the people generally.

As the line is in existence the provisions of section 15a (18) of the act are not applicable in the premises, the request for permission to retain excess earnings therefore must be dismissed.

We find that the present and future public convenience and necessity require the acquisition and operation by the Fort Benning Railroad Company, under lease and operating agreement, of the line of railroad in Muscogee and Chattahoochee Counties, Ga., described in the application.

An appropriate certificate and order will be issued, effective 30 days from its date.

MAHAFFIE, Commissioner, dissenting:

The applicant owns no railroad or equipment. It has what appears to be a favorable contract to operate tracks and equipment belonging to the United States. The tracks extend into the Government reservation. They are designed to serve that establishment. If the fort were a private industrial enterprise, I doubt if the majority would seriously consider issuing a certificate permitting it to operate its tracks as a common carrier. In my judgment, the fact that the Government is to be served should make no difference. The result of changing what is essentially a plant facility track into a common carrier is to enable divisions of the through rates to be obtained from the trunk lines. As there is competition between the Seaboard and the Central of Georgia (both in receivership) for the business, it is quite clear that liberal divisions can be arranged. The payment of divisions on account of what is really a plant facility operation simply puts that much of a burden on the transportation system of the country. The fact that gain from the divisions arrangement is to be divided between the contractors and the United States does not, as I see, alter the situation. The application should be denied.

[fol. 256] **Certificate and Order**

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 14th day of June, A. D. 1933.

Finance Docket No. 9709

Fort Benning Railroad Company Acquisition

A hearing and investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require the acquisition and operation by the Fort Benning Railroad Company, under lease and operating agreement as set forth in said report, of the line of railroad in Muscogee and Chattahoochee Counties, Ga., described in the application and said report.

It is ordered, That, when filing schedules establishing rates, fares, and charges applicable on said line of railroad, the Fort Benning Railroad Company shall in such schedules refer to this certificate by title, date, and docket number.

It is further ordered, That this certificate shall become effective and be in force from and after 30 days from its date.

It is further ordered, That the request for permission to retain excess earnings from said railroad be, and it is hereby, dismissed.

And it is further ordered, That the Fort Benning Railroad Company shall report to this commission as required by valuation order No. 24, effective May 15, 1928.

By the commission, division 4.

George B. McGinty, Secretary. (Seal.)

(g) Order of the Commission Dated July 11, 1933, Reopening the Proceeding for Reargument

[fol. 257] Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of July, A. D. 1933.

Finance Docket No. 9709

Fort Benning Railroad Company Acquisition

Upon further consideration of the record in the above entitled proceeding, of the petition of the Central of Georgia Railway Company and H. D. Polard, its receiver, interveners, for reargument and reconsideration, and of the reply of the Fort Benning Railroad Company to said petition:

It is ordered: That this proceeding be, and it is hereby, reopened and assigned for reargument at a time to be fixed.

By the Commission.

George B. McGinty, Secretary. (Seal.)

(h) REPORT AND ORDER OF THE COMMISSION DATED OCTOBER 4, 1933, DENYING, ON REARGUMENT, THE REQUESTED CERTIFICATE

By the COMMISSION:

The Federal Government owns a line of railroad extending from the Fort Benning Military reservation to connections at Fort Benning Junction with lines of the Central of Georgia Railway Company and the Seaboard Air Line Railway Company, hereinafter respectively referred to as the Central and the Seaboard, a distance of about 6.8 miles, in Muscogee and Chattahoochee Counties, Ga., together with certain tracks within the reservation. For about eight years the railroad was operated by the Central under a revocable license from the Secretary of War. On September 2, 1932, the license was revoked, and since October 18, 1932, the line has been operated by Henry A. Page, jr., and C. F. Harris, as private contractors.

[fol. 258] The Fort Benning Railroad Company is a Georgia corporation which Page and Harris have organized, with an authorized capital stock of $10,000, and this company applied for our authorization to acquire and operate the Government's line. The proposals were opposed by the Central and its receiver, interveners, but were supported by the testimony of a witness for the Seaboard and its receivers. On June 14, 1933, after hearing and

argument, division 4 made a favorable report, 193 I. C. C. 223, and issued a certificate authorizing the applicant to operate the Government's line, as proposed. Upon petition for reargument and reconsideration by the Central, the proceeding was reopened and further argument had, and the effective date of the certificate has been deferred until October 27, 1933.

The previous report sets forth pertinent facts of record concerning the nature and extent of the military reservation and its rail traffic, the physical relationship of the area to the two trunk lines, the history of the connecting line and its operation, the terms of the proposed lease and operating agreement, and the contentions for and against the application.

As grounds for reversal the interveners urge, among other things, that the War Department would not effect any substantial saving under the proposed arrangement, but the applicant would be in a position to demand large divisions from the Central and the Seaboard, that the Fort Benning Railroad is merely a plant facility, and that the rights of the Government in the matter are not greater than would be the rights of a private industry under like circumstances.

Under the arrangement now in effect, Page and Harris receive $1,000 a month for intraterminal switching and $5 for each loading car moving to or from the connections with the trunk lines. On the basis of an indicated annual movement of 2,800 loaded cars, their total compensation in a year would amount to $26,000. The applicant's revenues, on the other hand, are estimated at $55,000 a year, with net income of $13,000, or an annual return of 130 percent on all its capital stock, if, when, and as issued. Estimated common-carrier earnings of $43,000 a year are the equivalent of an average of about $15 a car for the short movement between the reservation and the junction. This revenue would accrue from divisions of joint through rates, and, therefore would operate as a reduction, pro tanto, of the Central's, or the Seaboard's revenue for the line haul.

Since there is no community of interest between the con- [fol. 259] tractors and the War Department, the instant case differs in that respect, and perhaps others, from those cases in which it has been proposed to intrude, between industries and line-haul carriers, operation by separate or-

ganizations, controlled by or affiliated with the industries, of short lines to act as feeders to the trunk lines. But this fact does not differentiate the case in principle.

We have heretofore said that independent operation of numerous short lines is not conducive to economies in transportation, that wherever possible needed transportation facilities should be furnished by existing carriers, and that this is especially true where the line proposed to be operated in interstate commerce will serve merely as a branch or feeder for an existing carrier. Operation of Lines by C. R. & E. Ry. Co., 94 I. C. C. 389. See also Tittabawassee R. Co. Proposed Construction, 189 I. C. C. 563.

A further objection was stated in Construction of Line by Jefferson Southwestern, 86 I. C. C. 796:

> Control of or affiliation with a short-line railroad by an industry furnishing a large volume of traffic opens the door to grave abuse, particularly when the short line connects with more than one trunk-line railroad. By playing one connection against the other they have frequently been able to gain concessions in divisions, or in car supply, or in other matters, which have, in practical effect, amounted to a preference of, or rebate to, the controlling or affiliated industry. * * * Moreover the connecting trunk lines, because of their competition with each other, often hesitate to bring such cases to our attention, * * *.

Here the applicant and its sponsors would be the sole beneficiaries of such practices, and at the expense of established carriers whose properties are in receivership. We think it is not a sufficient answer that the War Department uniformly exercises the right to route, where possible, because the record contains no assurance that such control of the traffic is substantial.

The previous report shows that the Central's receiver is willing to make the same arrangements with the Government as proposed by the applicant for operation of the railroad facilities serving Fort Benning, to dispense with arbitraries heretofore applied between the junction and the reservation, to make Fort Benning a common point on both trunk-line systems, charging the Seaboard only the cost of the service for switching to and from the junction, and to permit the Government to route the traffic as it sees fit.

We think a departure from the general policy can not be justified except in case of failure or miscarriage of such an arrangement, and that the original finding herein should be reversed.

[fol. 260] We find that the present and future public convenience and necessity are not shown to require the acquisition and operation by the Fort Benning Railroad Company, under lease and operating agreement, of the line of railroad in Muscogee and Chattahoochee Counties, Ga., described in the application. It follows that the certificate dated June 14, 1933, must be rescinded, and the application denied.

An appropriate order will be entered.

MEYER, Commissioner, dissenting:

The analogy between the Fort Benning Railroad and a plant facility, as the term is commonly understood, is not impressive. The War Department is not a profit-making institution but an executive department of the Federal Government existing for purposes of National defense. Efficient discharge of its functions benefits all of the people. The responsible military authorities were dissatisfied with past conduct of the Central and entered into an arrangement for operation of the Fort Benning Railroad which is considered favorable, satisfactory, and advantageous to the Government. The Department must be presumed to be acting in good faith and as the public interest appears to it to demand.

We approved a similar arrangement at Fort Bragg, in North Carolina. Cape Fears Rys. Operation, 170 I. C. C. 94. The propriety of the divisions demanded and retained by the Cape Fear Railways, also sponsored by Page and Harris, is now pending before us in a proceeding initiated by complaint of the Atlantic Coast Line Railroad Company, Docket No. 25309, and it is to be expected that just, reasonable, and equitable divisions will be prescribed by us. There is nothing to prevent similar control of the divisions that might be accorded to the applicant in the instant case, and the Central could be relied upon promptly and vigorously to complain to us if the applicant's demands were unreasonable or appeared unduly preferential or prejudicial as between the carriers. The public interest as measured by the War Department requires that Fort Benning's

traffic be free to flow untrammeled over either trunk-line route.

I am authorized to state that Commissioners Brainerd and Porter join in this expression.

Chairman Farrell also dissents.

Order

At a General Session of the Interstate Commerce Com- [fol. 261] mission, held at its office in Washington, D. C., on the 4th day of October, A. D. 1933.

Finance Docket No. 9709

Fort Benning Railroad Company Acquisition

Further argument and consideration of the matters and things involved in this proceeding having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the certificate of public convenience and necessity dated June 14, 1933, heretofore issued in this proceeding, be, and it is hereby, rescinded, and the application herein be, and it is hereby, denied.

By the Commission.

George B. McGinty, Secretary. (Seal.)

(i) Order of the Commission Dated December 11, 1933, Denying Petition of Fort Benning Railroad Company for Reopening and Reconsideration of the Case

Upon further consideration of the record in the above-entitled proceeding, of the petition of the Fort Benning Railroad Company for reopening and reconsideration filed November 10, 1933, and of the reply of the Central of Georgia Railway Company and H. D. Pollard, its receiver, interveners to said petition:

It is ordered, That said petition of the Fort Benning Railroad Company be, and it is hereby, denied.

By the Commission.

George B. McGinty, Secretary. (Seal.)

THE TESTIMONY OF THE WITNESSES IN FINANCE DOCKET NO. 9709, STATED IN NARRATIVE FORM, IS AS FOLLOWS:

Before Examiner R. R. Molster

[fol. 262] APPEARANCES

Moultrie Hitt and G. Kibby Munson, Washington, D. C. for Fort Benning Railroad Company, Applicant.

T. M. Cunningham, Savannah, Georgia, for Central of Georgia Railway Company and H. D. Pollard, Receiver.

Proceedings

Examiner Molster, after announcing the hearing, called for appearances, whereupon those previously listed were recorded by the several Counsel. Mr. Cunningham stated that since the proceeding was instituted the Central of Georgia Railway Company had gone into the hands of a Receiver, with Mr. Pollard as Receiver, and that he offered a petition of intervention for Mr. Pollard which was received by the Examiner. Mr. Hitt then requested, and permission was granted by the Examiner, to have the application and return to questionnaire of the Commission be considered as a part of the evidence. Thereupon he called General Williams as the first witness for the Applicant.

Testimony of ALEXANDER E. WILLIAMS

My name is Brigadier General Alexander E. Williams, Assistant to the Quartermaster General, and I appear at the instruction of the Assistant Secretary of War. I am familiar with the application by the Fort Benning Railway involved in this proceeding and with the lease and contract entered into with that Company. The operating contract required the lessees to provide common carrier service when such service is permitted by the Commission. The Fort Benning Company is obliged to provide adequate transportation for Fort Benning. I have a statement showing the population at Fort Benning to be between 7500 and 8000 officers and men, with their families, including civilians and their families. The statement shows the annual change in personnel at Fort Benning and the approximately 2800 carloads of freight handled in and out each year. (The statement was received as Exhibit No. 1.)

Two kinds of railroad service are essential to serve this community; first, between Fort Benning and the outside world, and, second, a local service from point to point within the Reservation. In 1931 we found it necessary to curtail rail transportation expenditures, and in investigating the personnel in the field we found the cost of operating the shops at Fort Benning to be excessive. During a trip to Fort Benning in January, 1932, to determine what economies could be made the Commanding General and Quartermaster at the Post brought up the matter of the operation [fol. 263] of the Fort Benning Railroad, and, having investigated the records and held conferences, I found that the services rendered by the Central of Georgia were not satisfactory to the Post authorities.

I am in charge of all transportation matters for the Army throughout the country and such matters come under my jurisdiction. My trip to Fort Benning was made in an effort to reduce general transportation expenditures.

Acting on the recommendation of the officers that the Fort operate its own connection with the Central of Georgia, I investigated upon returning to Washington and found that we had sufficient funds to operate the railroad without outside assistance, but did not have sufficient funds to maintain the tracks. Accordingly I advised the authorities that nothing could be done. Thereupon I investigated the local operation at Fort Bragg, and, finding that satisfactory, it suggested that the same system could be put in at Fort Benning. As a result, it was recommended that a contract be entered into with Page & Harris to operate the Fort Benning Railroad. After an investigation for some time we entered into such a contract and notified the Central of Georgia that their contract and local license would be revoked after thirty days' notice.

With reference to the Central of Georgia's petition to intervene there are several statements upon which I wish to comment. Paragraph 6 states that the Seaboard Air Line Railway Company voluntarily removed its connecting track. The War Department's records indicate that the Central of Georgia itself removed this track, leaving only the connection between the Government railroad and the Central of Georgia. (Mr. Cunningham thereupon admitted this to be a fact, and that the statement referred to in the petition to intervene was in error.)

Paragraph 7 of the petition for intervention states that during the time the Central of Georgia was operating the Fort Benning Railroad line no complaints were received as to the service furnished except in one instance. This is not entirely in accordance with the records of the War Department. A letter to the Quartermaster General from the Post Quartermaster at Fort Benning, dated January 20, 1932, complains of unsatisfactory service by the Central of Georgia over a considerable period, and encloses correspondence between various officers at Fort Benning and the Central of Georgia. In that letter the Quartermaster recommended that the license granted the Central of Georgia Railway Company under date of April 21, 1924, be revoked, and that competition be invited between the Seaboard Air Line Railway Company and the Central of Georgia Railway Company. The main lines of these Railways and the Government railroad from the Post join at Fort Benning Junction. The letter further recommends that a new revocable license be granted making definite provisions of the Government's transportation and switching service requirements, and that the Quartermaster at this station be authorized to furnish the rail transportation and switch [fol. 264] service from the Government track up to Fort Benning Junction. This is the recommendation that was made to me personally when I made the trip to Fort Benning. (The letter referred to was received in evidence as Exhibit No. 2. Mr. Hitt explained that attached to the letter were enclosures consisting of correspondence between the Military authorities and the Central of Georgia Railway bearing various dates from November 20, 1931, to December 16, 1931, all of which were received as parts of Exhibit No. 2.)

Paragraph 7 of the petition for intervention states:

"nor was any complaint made that the rates charged were too high or in any respect unsatisfactory."

With regard to the rates, not only the Chief Coordinator but the Comptroller General took a hand. The Chief Coordinator, under date of August 5, 1924, wrote the Secretary of War complaining that the advantage to the Government of the present arrangement was not apparent from a cost of transportation standpoint, and stating that if the Fort Benning Junction rates had been applicable to Fort Ben-

ning, on the 514 carloads routed by the Coordinator's office during the ten month period from January 1, 1923, to July 1, 1924, there would have been a saving to the Government in transportation cost of approximately $16,000. The letter further stated that unless there were advantages in the existing arrangement not apparent to the Coordinator's office which justified the present additional cost of transportation the Coordinator's office was of the opinion that the agreement should be modified or terminated. (The letter referred to was received in evidence as Exhibit No. 3.)

On April 30, 1926, the Comptroller General wrote the Quartermaster General inviting attention to the existing rate situation at Fort Benning which forced the Government to pay an excess freight charge of 24¢ per ton on coal from mines at Dora, Alabama. This indicates that the Government was not satisfied with the rates accepted by the War Department. (The letter referred to was received as Exhibit No. 4.)

These letters are offered to establish the facts that the rates were not satisfactory to the Government.

In paragraph 7 of the intervening petition the Intervenor states that he was not advised that any such recommendation had been made to the War Department. Among the letters received in evidence is one advising the Central of Georgia that it would be necessary to recommend revocation of the lease if certain service was not re-established. General King, commanding at Fort Benning, in a letter to [fol. 265] the Assistant Secretary of War dated October 1, 1932, states that, in response to the railroad's complaint that it was not informed of his (General King's) recommendation that the railroad's license be revoked, attention is invited to the letter of December 5, 1931, informing the railroad that such a recommendation would be submitted unless the agreed schedule was re-installed at once. This request, however, was not submitted until January 20, 1932, more than a month after the information of his (General King's) proposed action had been received by the railroad. The letter further states that General King felt that, having made these recommendations, further action on his part was beyond his province. (A copy of the letter referred to was received as Exhibit No. 5.)

Paragraph 7 (page 5 of the intervening petition) states that the alleged unsatisfactory service which was given to

the Central as the reason for the revocation of its license was no reason at all, but was merely an excuse. From what I have already said it is quite clear that the service rendered by the Central of Georgia was not satisfactory, and the authorities at Fort Benning having exhausted all efforts to improve the situation based their recommendation for a change on the fact that the service was not satisfactory to them, and that the new arrangement would effect a saving in the expenditure of Government funds.

The petition for intervention further states that

"this whole matter was conducted secretly".

I think that the evidence from the War Department's records already offered sufficiently shows that no secrecy was either contemplated or practiced in the correspondence or conferences relating to the improvement of service for Fort Benning. The correspondence placed in the record does not show that they were marked or held secret either at Fort Benning or at the War Department, and in the personal conferences which I held with a number of officers at Fort Benning no secrecy was enjoined either by me or the officers at Fort Benning.

The intervening petition further states that the rates were agreed upon by the War Department and the petitioner (Central of Georgia) as reasonable and just rates for the service performed. It is true that the Assistant Secretary of War, on September 25, 1924, accepted the rates submitted by the Railway, but the letter to the Chief Coordinator (Exhibit 3) indicates that the War Department was not entirely satisfied with them. (The letter referred to was received as Exhibit No. 6.)

[fol. 266] By Examiner Molster:

The Chief Coordinator is an officer of the Bureau of the Budget whose functions are to coordinate the expenditures of the Government and its purchases, wherever he can effect a saving. It was in performing these functions that he questioned the operations of the War Department, especially as to rates paid railroads.

By Mr. Hitt:

On November 24, 1926, the Quartermaster at Fort Benning (he is the representative of the Government in han-

dling the Fort Benning Railroad) wrote to the Quartermaster General on the subject of freight rates, stating that in view of the large amount of business handled in and out of Fort Benning he was of the opinion that through rates should be published, applying to and from Fort Benning, no higher than the Columbus, Georgia, rates. This indicates that the rates were not satisfactory to the Government (The letter referred to was received as Exhibit No. 7.)

In paragraph 16-d of the intervening petition it is stated that any and all service that will be or can be performed by the Fort Benning Railroad Company can be better performed by the petitioner (Central of Georgia) with its railroad facilities. The performance of the Fort Benning Railroad Company during the short time it has operated at Fort Benning proves that the reverse is true. In fact, the Central of Georgia did not perform all the railroad service, but merely brought the cars in, it being necessary for the Government to maintain an engine and crew to perform the switching between the points on the Reservation not covered by the Central of Georgia contract. Under the present arrangement the one contractor, the single railroad organization, handles all shipments received from connections with other railroads and also handles the intra-Post shipments, so that we have a single organization operating the whole road. The new arrangements also give us a connection with the S. A. L. which we did not have under the former arrangements with the Central of Georgia.

These statements are for the purpose of explaining, in view of the criticism by the Central of Georgia of the change on the part of the War Department, why we made the change, and that by so doing we actually obtained more satisfactory service and effected a saving in the expenditure of Government funds. These were the two principal objects.

[fol. 267] To summarize, in the opinion of the War Department there is a decided advantage in having access to both the S. A. L. and the Central of Georgia, which was not available under the operation by the Central of Georgia. More advantageous rates are available, especially from Savannah, through the connections with the S. A. L., it being a shorter distance from this point via the Seaboard than the Central of Georgia. The service is more satis-

factory and the equipment is available at all times for quick moves at the Post, which is a distinct advantage to the Military authorities. A decided economy to the Government will be effected if and when the Fort Benning Railroad is granted common carrier privileges because, whereas a large portion of the population at Fort Benning is composed of civilians, certain restrictions are placed upon the utilization of Government equipment for the benefit of civilians. Of course, a common carrier service can be performed for civilians more satisfactorily than by a Government operated road.

The War Department is interested only in securing the most sufficient service available and reducing the cost of railroad operation at Fort Benning. These objects have been accomplished in a measure by the change recently made, but the saving effected will be increased when the present contractors (Page & Harris) become a common carrier. For that reason the War Department is interested in the accomplishment of this fact at the earliest possible date.

Cross examination.

By Mr. Cunningham:

The civilians who live at the Fort either have business in connection with the Fort or are located adjacent to it. The Government railroad can not serve them as it serves anybody else because, judging from my thirty-eight years experience in the Army, there are legal restrictions which prohibit Government operation from doing certain things for civilians.

I have no definite information as to whether the civilians had difficulty with the Central of Georgia's operations up to the time its license was revoked. The civilians are at the Fort only by permission of the Government, and are under the jurisdiction of the Commanding Officer. I presume they are performing some kind of service in connection with the Fort, although I do not know that to be a fact.

I knew of Mr. Page's family before the matter of the revocation of the Central of Georgia's license arose, but I did not know Mr. Page until this proceeding came up. [fol. 268] I do not come from that section, but from between Fayetteville and Raleigh. I first got in touch with

Mr. Page in connection with the matter when the application was made from Fort Benning for their license. The application originated at Fort Benning in a letter from the Quartermaster through the Commanding General, General King, who forwarded it to the Quartermaster General. As I recall, the Quartermaster who signed the letter was Colonel Hall. I do not have a copy of the letter with me, but will furnish it. Previous to this time I knew of the Pages' operation at Fort Bragg.

I recall that Mr. Pollard came to see me on the subject of the revocation of the license of the Central of Georgia, but I do not recall the date, although it was soon after the notification was sent by General King. It was not before this notification because Mr. Pollard at the time had a telegram advising him that the Company had been notified that its license had been revoked.

In this interview with Mr. Pollard I advised him that the service was unsatisfactory and for that reason the license was revoked.

The Assistant Secretary of War signed a revocable license with the Pages to operate the Fort Benning Railroad, but I do not remember the date. It was in the office of the Assistant Secretary for sometime while he investigated the matter. I do not recall that at my meeting with Mr. Pollard the question of any arrangement or conference with the Pages about the operation of the railroad came up. I did not tell him that I knew of it. I explained to him that the recommendation for a change because of unsatisfactory service had come from Fort Benning and had been accompanied by a proposed contract with Page & Harris. I do not recall the details of the conversation except that I did advise him to get in touch with Fort Benning because the matter had originated there.

Besides the letter of January 20, 1932, which has been placed in evidence, I have other letters in the files with a variety of dates from November 20th to December 5th. I think there are other letters in the file, but I do not recall, and I haven't them here. I do not definitely recall any other letters relating to complaints of unsatisfactory service on the part of the Central of Georgia that I could submit. The only other complaints of the service that I know of were in personal conferences with officers at Fort Benning. I do not know of particular instances, having based

my conclusion that it was unsatisfactory on the general statements to that effect.

I was in Fort Benning early in January, January 5, 1932, [fol. 269] I think it was. At that time one of the complaints was relative to the withdrawal of the double daily service which the Central of Georgia had formerly given at the Fort. Others were that the trains were late and that freight was not delivered at the time they had the detail ready to receive it. Those were the principal ones that were stated to me.

I do not know that the double daily service was in fact replaced on February 26, 1932, although I understand it has been re-established in a measure. I do not know the date when it was re-established altogether, my impression being that it was not until about April.

In connection with the letter of August 5, 1924, from the Chief Coordinator to the Secretary of War (Exhibit 3) I do not recall definitely that the revocable license to the Central of Georgia became effective on June 15, 1924. As to whether the Central of Georgia satisfied the War Department regarding the complaints as to rates, there is a letter in the files in which the L. & N. applied to the Interstate Commerce Commission to reduce the rates. I do not see any letter in which the Central of Georgia acceded to the request of the Government in connection with the rates, but while I can not establish it, I think that a trade was made with the Central of Georgia that if they would reduce their arbitrary the Government would let them get a long haul. The Government did not profit entirely by the reduction in the arbitrary because they lost something in granting the long haul to the Central of Georgia. I am not a rate expert, but, as I understand it, in giving the Central of Georgia the long haul the Government was not able to take advantage of the haul by the L. & N., and that we thereby lost something in the through rate. We gained something in the arbitrary. Whether the loss was equal to or greater than the gain I can not say.

I do not know whether the letter of August 5, 1924, was the first instance in which we asked for a reduction in rates, nor do I know that the Central of Georgia continued to reduce rates at the request of the Government, that is the arbitraries between Fort Benning and Fort Benning Junction, the only instance I know about, is the one I mentioned.

I do not know whether the Comptroller General's letter of April 30, 1926, to the Quartermaster General (Exhibit No. 4) was ever communicated to the Central of Georgia. There was correspondence subsequent to this regarding rates, but whether that particular letter was taken up with the Central of Georgia I do not know. To ascertain whether the reduction recommended by that letter was made I would have to look up other files which I have not done. [fol. 270] In connection with General King's letter of October 1, 1932, (Exhibit No. 5), in which he stated that the Central of Georgia was definitely advised of the military necessity of maintaining a two train daily schedule, and that noncompliance would result in a request for the revocation of their license, I do not know the definite date when this service was put back, but I understand that it was restored before the last recommendation from the Post for revocation of the license was received.

Another recommendation of the revocation of the license, in addition to the letter of January 20, 1932, was from the Post Quartermaster, Colonel Hall, in which the recommendation was renewed. The date of this letter was about July 11, 1932. This is the letter which you have asked for and will later be introduced. This letter was not communicated to the Central of Georgia.

There is nothing in the records to show that the letter of January 20, 1932, which is in evidence (Exhibit No. 2), or any recommendation that the license be canceled, was ever communicated to the Central of Georgia. The letter of November 24, 1926, from the Quartermaster Department to the Quartermaster General (Exhibit No. 7) is mainly a complaint that no through rates had been established, but that combinations of local freights were still used on all shipments to and from Fort Benning, Georgia. This was introduced simply to show that there was dissatisfaction with the rates on the part of the Government. There is no record to show whether this was called to the attention of the Central of Georgia, but I presume that the local people responsible for it had contact with the representatives of the Central of Georgia and advised them of these complaints.

Replying to the question if the Government desired competition between the Central of Georgia and the Seaboard Air Line, it could not at any time have connected the Sea-

board track with the Fort Benning track: The Government once had it connected and the Central of Georgia removed the connection. I do not know whether this was done only after the Seaboard had not shipped freight over the track in several years, nor do I know that none of the Seaboard freight coming into Columbus over the Seaboard was ever delivered over that connection to the Fort Benning Railroad. I don't know whether it was out of use for two or three years before the connection was ever removed. There was nothing to prevent the Government, if it wished, competition, from ordering the Central of Georgia to restore the connection and give the Seaboard entrance to the Fort Benning track, but since the Central of Georgia was operating the local line and had removed the connection [fol. 1] of the Seaboard, thus depriving us of the competition of the Seaboard, the local authorities naturally used the Central of Georgia over which to make shipments.

During the time the Central had its license very little traffic came over the Seaboard. The Government had the right to route its traffic any way it wished, but had agreed to give the long haul to the Central of Georgia in return for the reduction of its arbitraries. There was no reason why the Government at any time that this arrangement was not satisfactory could not have said "we cancel it", and we in fact did cancel it because it was not satisfactory. There was no reason previous to its cancelation, when we made the arrangement with the Pages, why we could not have canceled it at any time we wanted; it is revocable.

There is this reason why we could not have made the same arrangement with the Central that we made with the Pages. The Central had been operating in there and the arrangement had not been satisfactory to the local people. Therefore, they did not want to make a new arrangement. The respects in which the service of the Central of Georgia was unsatisfactory were brought to my attention in my conferences at Fort Benning. As already stated, the afternoon service was removed and they were unable to get traffic at the Fort on time, which caused them delays and trouble in that way.

I am not advised as to the exact service they are getting from the Fort Benning Railroad, but according to verbal reports it is more satisfactory than was obtained before from the Central of Georgia. In this I am not differentiat-

ing between the service inside the Fort and that outside. I mean the whole service. I do not know whether the Fort is now getting a double daily service.

When the Central operated into the Fort the Government did some switching itself. The Central might do some of the switching in the Fort if it maintained a switch engine at the Fort at all times subject to the call of the Commanding Officer. My understanding was that they did not have a switch engine there all day, but I was not on the ground.

The Seaboard Air Line has only one line into Columbus. I am not advised as to the service they render and I do not know whether they operate any passenger service over that line. With reference to the rates, it makes no difference whether freight is routed by a Land Grant road or some other road provided the other routes meet the Land Grant rate. Whether they always do so or not I do not know.

(Thereupon the witness was excused.)

[fol. 272] By Mr. Hitt:

Captain Betts of the Judge Advocate's Office has a statement to make for the War Department.

STATEMENT OF CAPTAIN BETTS

By Captain Betts:

My statement is not as a witness but, as Counsel for the War Department in this matter, I wish to state the Department's attitude. I am Captain J. C. Betts, Judge Advocate General's Staff, Judge Advocate, Fort Benning, Georgia. The War Department's representatives are not prepared to defend or justify the action which the Secretary of War saw fit to take in revoking the Central of Georgia's license to operate the Fort Benning Railroad, for we had not anticipated that the Commission would concern itself with that action. I have no ground for supposing that it will do so except the implications arising from the questions asked by Counsel for the Intervenor.

The War Department's interest in this matter is adequate transportation at the lowest cost to the Government. The War Department revoked the Central of Georgia's

license because the service was not adequate, and, in performance of his obligation to provide the Government with adequate transportation, he entered into this arrangement with Page & Harris which would accomplish this object at less cost.

By Examiner Wolcott:

The Secretary of War was under no obligation to assign any reason for cancelling the Central of Georgia's license. He acted with executive authority and the courts would not question that. The Central of Georgia's license was revocable. That is the only type of license the Secretary of War is authorized to give.

Thereupon Mr. Cunningham made the following statement:

The Central of Georgia has never taken the position and does not now, that the Government could not cancel the license granted the Central of Georgia for any reason, good or bad, or no reason at all. The point of this investigation is whether or not it is in the public interest for a certificate to be granted to the Fort Benning Railroad to operate the line from Fort Benning Junction to Fort Benning proper as a common carrier. Our comment on that is that the Government has in effect inserted the Pages between the common carriers and the Fort, the effect of which would be to diminish the revenues of the [illegible] carriers and to pay a profit to the Fort Benning Railroad which has no real investment in any property whatsoever; that the service proposed by the Fort Benning Railroad can be better provided by the Central of Georgia, and that the only persons whose interest the present arrangement subserves are those who have invested a small amount of money in the Fort Benning Railroad.

The evidence already adduced here for cancelling the Central of Georgia's license has come from the War Department, and we contend that it constitutes no reason at all, that it is a mere excuse, and that the arrangement with the Pages was made secretly, without our knowledge, and without giving us an opportunity to be heard.

We want to show as the case progresses that the Government did not revoke the license because of unsatisfactory service, but that the real reason was to obtain con-

petition between the Central of Georgia and the Seaboard Air Line to reduce the arbitrary between Fort Benning Junction and Fort Benning. I think the case is going to turn on the question as to whether the public convenience and necessity requires this operation by these people with whom the Government has contracted. The ideal method of operation would be by the Central of Georgia, which is a common carrier equipped now to handle all business. The Seaboard Air Line can connect their track any time they want to and make themselves a local station on the Fort Benning Railroad just like the Central of Georgia. Joint operation might be better, but I do not think either the Seaboard or ourselves would want this. Operation by either one line or the other is to better advantage.

(Statement by Mr. Hitt.)

There is nothing more for us to say except we contend the operation to be more economical and efficient by the Fort Benning Railroad.

Thereupon Mr. Cupps was called as a witness for the Applicants.

Direct examination

By Mr. Hitt.

My name is C. R. Cupps, Norfolk, Virginia. I am Chief Traffic Officer of the Seaboard Air Line Railway, and have been for many years.

The intervention petition of the Central of Georgia Railway Company in this matter contains certain inaccuracies and misrepresentations as to the acts of the Seaboard Air Line and the Receivers of the Seaboard Air Line which I wish to correct. Section 6 of the petition states that the tracks of the Seaboard were connected with the Fort Benning line at Fort Benning Junction when the revocable license was granted to the petitioner effective January 15, [illegible] 274, 1924, but thereafter the Seaboard Air Line voluntarily removed this track. This is not a true statement. The Seaboard did not remove its frog and switch until some day subsequent to April 18, 1928, more than three years after January 15, 1924, and did not remove its frog and switch until after the track had ceased to be a connect-

ing track. A report dated December 2, 1927, from one of the Seaboard's General Superintendents advised that the Central of Georgia had broken the connection at this point and a part of the track had been removed, the frog and switch in our main line, however, still remaining. After investigation and consideration the General Superintendent was given authority on April 18, 1928, to remove the frog and switch from what had been the connecting track up to the time when the Central of Georgia destroyed it as a connecting track by taking up the Government's end of the track.

Section 12 of the Central of Georgia's petition again misrepresents the situation by failing to produce facts in its possession when the petition was filed. I offer in evidence as Exhibit No. 8 a copy of my letter of August 24, 1932, to Mr. Henry A. Page, and as Exhibit No. 9 a copy of my letter of September 25, 1932, to Mr. W. McN. Knapp, Traffic Manager of the Central of Georgia. Notwithstanding the fact that the latter letter had been in the possession of the Central of Georgia for several weeks prior to its filing of the intervention petition, the petition fails to disclose that the allowance to the Fort Benning Railroad Company of a proportion of 50¢ per ton on coal was to be applicable only when the proportion of the rate accruing east of Montgomery, Alabama, was $1.42 per ton, and also that the proportion offered the Fort Benning Railroad for petroleum was applicable only on refined petroleum products moving from Savannah, Georgia. These letters make it quite clear that the division arrangements there confirmed were not applicable to fuel oil which is not a refined petroleum product, and were not applicable from any point but Savannah, Georgia, even on refined petroleum products. (Exhibits 8 and 9 were received in evidence.)

Section 13 of the Central of Georgia's intervention petition is misleading in that in stating "the resultant loss on the three commodities, coal, gas and fuel oil" it assumes that all of the gas oil was shipped from Savannah, Georgia, when it knows that this gas oil was moving largely, if not wholly, from Baton Rouge, La. It further assumed that the Seaboard had committed itself to certain allowances to the Fort Benning Railroad on fuel oil which is contrary to fact, and that all coal destined to Fort Benning, Georgia, [fol. 275] would be routed over the L. & N. Railroad via

Montgomery, Alabama, which in my opinion is a doubtful prophecy.

Furthermore, the Central of Georgia's expressions in the intervening petition with respect to the Seaboard revenues are without the slightest authority from the Seaboard. While Fort Benning, Georgia, has been treated as a local station of the Central of Georgia, the revenue which the Seaboard has derived from its handling of Fort Benning traffic has been inconsequential. On all such traffic handled by the Seaboard during the calendar year 1931 its gross revenue totalled only $2,519.52. The loss of such a small amount might well concern the Seaboard, but it is not sufficient to bring tears to the eyes of a competitor. As a matter of fact, the Seaboard confidently expects that the Commission's approval of the application of the Fort Benning Railroad will result in a very substantial increase in Seaboard revenues.

The Seaboard heartily supports the application. It believes it will be advantageous to the Government to have a connection with two railroads rather than with one. Since the Seaboard has a connection at Columbus, Georgia, with the Southern Railway, the granting of the application means in effect that the Government's plant at Fort Benning would have the protection of the facilities of three railroads instead of remaining in the position of a local station with one railroad.

The Seaboard feels it should not be debarred from a business which as a taxpayer it helps to support.

As to the Seaboard's policy with respect to divisions with the Fort Benning Railroad if a certificate is granted, on October 19th the Receivers of the Seaboard wrote Mr. Pollard, President of the Central of Georgia that it would be our policy to allow them such proportion of all freight rates as may be necessary to yield them a reasonable profit with a proper conservation of our own revenues.

Cross-examination.

By Mr. Cunningham:

The Seaboard took out its connecting frog and switch on the Fort Benning Railroad sometime subsequent to April 18, 1928. For several years before that this connection was not our interchange point (for Fort Benning

business), and we had no occasion to use it. Our deliveries were not made through that connecting track, but through the Central of Georgia, even while we had the connecting track.

With reference to the statements in the intervening peti- [fol. 276] tion as to the proposed divisions on coal, this is what the petition says:

"The Receivers of the Seaboard Air Line Railway have agreed to allow Fort Benning Railroad Company out of the through rate on coal 50¢ a ton, but if the coal moves via Land Grant Railroads, as it would if it moved, for instance, from Louisville and Nashville, Alabama mines the allowance to Fort Benning out of the through rate on coal would figure 39¢ per ton."

I suppose you figured the loss on the basis of 39¢ a ton.

My letter (Exhibit No. 8) states:

"The current rate on coal from Alabama Group 1 mines to Fort Benning Junction is $2.59 per net ton. In the division of this rate $1.42 accrues east of Montgomery. We are willing to sub-divide this proportion of $1.42—92¢ to the Seaboard and 50¢ to the Page Railroad."

But I also said that if as a result of changes in the rates or subdivisions the $1.42 proportion east of Montgomery should be increased or decreased the subdivisions will be correspondingly changed.

In computing the loss and the rate we actually have you gave us the advantage of the reduction in the rate in computing the loss at 39¢ as to that particular case. But you made the statement that the Seaboard had agreed to allow 50¢ a ton out of the through rate regardless of the point of origin. You made your calculation on the basis of 39¢ a ton only in the case of coal that might originate on the L. & N. Railroad. I can not tell you off-hand what the division would be if the coal originated elsewhere.

If it is true that the actual movement of coal is by the L. & N. Railroad, and though I do not know it to be a fact I accept your statement as to that, you correctly calculated the allowance to be made by the Seaboard at 39 cents. I do not criticise the calculation.

With reference to the rate on gasoline, I think the point of origin would affect the amount we would concede as a

division to the Fort Benning Railroad, that is whether it came from Baton Rouge or Savannah. In some cases we could not afford to allow as much as we have offered on gas from Savannah, which is the only origin on which we figured. The gas is now moving from Baton Rouge and Brunswick, but I have made no arrangements as to the allowance to the Fort Benning from these origin points. I do not know whether we would make them any lesser division than from Savannah. I specified Savannah because we were asked to fix a division only from that point. Regarding fuel oil, I do not know, because I have not given consideration to it, whether we should not make them as [fol. 277] good an allowance as on gas. I don't know what the fuel oil rate from Savannah to Fort Benning is. The particular items mentioned in my letter (Exhibit No. 8) were the only ones we had to consider at that time. Coal and gas constitute a large amount of traffic. I do not know whether we will make comparable allowances on other traffic. That depends on what is necessary to give them a reasonable profit.

It is to our advantage to have the Fort Benning Railroad operate the Fort Benning track rather than the Central, even if our connection with the Fort Benning Railroad is restored and is made a local station on the Fort Benning line, because we would rather have the operation in the hands of a neutral connection than of a competitor which might place his own cars more promptly than ours. I would not feel entirely satisfied that we would receive impartial treatment.

I think there is very little outbound freight from Fort Benning, but the reason I have just given would apply to inbound freight as well. If it came to a choice of making deliveries as between its own cars and a competitor's the Central of Georgia would favor its own cars.

If the Central operated the Fort Benning line and the Seaboard had a local station on the Fort Benning line I do not know whether we would pay the Central 39¢ out of the rate on coal or 33⅓% of the rate on gas. We pay more than that on some commodities now. If the Central was operating the connecting track there and was willing to switch for the Seaboard and put that connecting track in there and compute the interchange of cars on the connect-

ing track, a switching charge usually would cover the service.

If it was desired that we should operate the Fort Benning Railroad we have the facilities to do so in connection with our Columbus line, over which we operate one scheduled train a day and such other trains as business may justify. At present we do no passenger business over that line.

We are already doing more business than heretofore at Fort Benning, but I do not have the figures.

By Examiner Molster:

I think the Seaboard would be interested in operating the Fort Benning track if we could control all of the business. We would not be interested in operating it in conjunction with the Central of Georgia, and I do not think the situation demands joint operation. The only conversation I have had with the officers of this Fort Benning Road [fol. 278] with regard to divisions are the matters to which I have already referred.

By Mr. Cunningham:

The War Department did not call me into a consultation when they were preparing to make this arrangement with the Fort Benning Railroad people, and I did not know that they were going to make a contract with Page & Harris until they had actually made it. We had no advance information from the War Department. Our arrangements with Page & Harris about the allowances we would offer were made on August 24, 1932, and at that time I knew that the Government was having some communication with the Fort Benning Railroad about leasing the property. This information came from Mr. Henry A. Page, Jr. I had no communication with the War Department about it at all. I had a representative of ours see Secretary Payne to advise him we were interested in the matter in August.

(Thereupon the witness was excused.)

Mr. PAGE was then called as the next witness for the Applicants.

Direct examination.

By Mr. Hitt:

My name is H. A. Page, Jr., of Aberdeen, N. C., and I am the H. A. Page, Jr., referred to in the application in this proceeding. I have no change to make in the application or the answer to questionnaire in this case, the essential facts being there correctly and fully set out. I am thoroughly familiar with the physical characteristics of the Fort Benning Railroad and with the Central of Georgia's former operation into the Military Reservation.

I was asked by the War Department to look over the whole situation with a view to entering into arrangements to operate these facilities under lease from the War Department and to see whether the service could be better and more economically operated by an independent local railroad than by the Central of Georgia, or in part by the Central of Georgia and in part by the Government. We concluded that we could do so both as to the common carrier service and the intra-Reservation service.

My reasons are these: I knew something of the difficulties and handicaps under which the larger carriers labored and was familiar with the difficulties which they would encounter in rendering a complicated local service with any unusual angles. First, an outstanding feature of the Fort Benning situation was its need for its own intra-Reserva- [fol. 279] tion service. With a trunk line operation this meant two sets of engines and crews operating on the same reservation tracks, and it was apparent that this double operation was uneconomical. I do not know whether the Central of Georgia had the right to render non-common carrier service such as the intra-Reservation operation, but they were not doing so, and I do not believe they could do so economically. If they could and had wanted to do so it would have been uneconomical because a big system is not organized for that sort of work. Their organization does not fit into that sort of picture. It would not be impossible but would be impracticable.

For example, when a common carrier railroad is called upon to do non-common carrier work for an industry I

understand that they furnish an engine and crew and charge for it on an engine hour basis. That could be done in this case, but an engine hour basis where the equipment is available twenty four hours per day is very expensive and any other basis would not fit in with their way of doing business. Furthermore, large railroads operate under rules and regulations for their crews and employees which I understand are technical and contain penalties which are not adapted to unusual situations like this, whereas we can employ our own men on a basis to fit our needs, but without rules and interpretations which make the larger roads pay out a lot of money which they did not expect. Such complications have arisen in the course of the Central of Georgia's operations between Fort Benning Junction and Fort Benning. The President of the Central of Georgia told me that the arbitration board handed down a decision which cost the Central about $12,000 in a controversy over that service. I have a copy of that award in that case, but the Central of Georgia people can doubtless give more complete information on what occurred.

Besides having our own men employed to fit our own conditions and not restricted with rules unrelated to the peculiar existing conditions, we would have our own general manager on the ground all the time to respond to whatever service the Fort authorities wanted at any time of the day or night without delay, without resorting to instructions or authority from someone else and without a lot of red tape reporting, telegraphing or writing to the heads of half a dozen different departments. This freedom to act immediately and with common sense makes for economy and efficiency.

I think it would be more economical for the Central of Georgia to pay just and reasonable divisions to the Fort Benning Railroad than to attempt to render the service [fol. 280] themselves, although I have made no specific figure. We are seeking a profit for ourselves just as the Central is. We are both in the same position in that respect. We do not believe that what we would be entitled to in divisions would exceed what it would cost them to render the same service themselves.

We have made no definite arrangements for divisions with our connections except as to a very small amount of the traffic which will come from the Seaboard Air Line.

Those are the divisions to which Mr. Capps referred. We have reached no other agreement except that the Seaboard assures us that they will give us just and reasonable divisions, and we shall not expect any more than that from the Central. The saving to the Government from lower rates is another question. Of course, there will be a large saving to the Government when we succeed in making the rates to and from Fort Benning the same as to and from Fort Benning Junction. That saving will represent a corresponding loss to the Central of Georgia unless they succeed in choking us off in some way so that they can keep that profit.

I read the Central of Georgia's petition for leave to intervene, in which they complain of this loss, and, though I do not say their figures are right, it is true that they will at least lose the arbitraries. That will be a net loss to them. However, there will be a net saving to taxpayers. We do not see why we should be denied our certificate so that the Central of Georgia will not lose this dole from the Government, especially when the Central of Georgia would certainly not make such an exaction of a private industry which could move away to a more favorable rate location.

The common carrier service between Fort Benning Junction and Fort Benning will consist of main line haul of approximately 6 miles between Fort Benning Junction and Fort Benning station, and also the customary placement and movement of the cars in common carrier service at the numerous unloading points within the Reservation. This placement of cars for loading in common carrier service will not be a part of the so-called intra-Reservation service, for which we are paid $1,000 per month. This is simply the placement which is customary out of line-haul rates. After a car is once placed at one location for partial unloading and then the Government wished it moved somewhere else to finish the unloading the last movement will be intra-Reservation service.

Describing more fully the intra-Reservation service, the [fol. 281] Government has a lot of equipment of its own and there are many strictly local movements between points wholly within the Reservation. These movements are the intra-Reservation service for which we are paid as contractors.

We have nothing to say about the Government's complaints about the service of the Central of Georgia. They do not concern us. We were simply asked to look over the situation and see what we could do.

The Fort Benning Railroad expects to serve, besides the Government, the contractors, the Army officers and men and their families and probably some residents living adjacent to but outside the Reservation who will find need for common carrier service. In other words, we will hold ourselves out to serve the general public and provide facilities for that purpose.

The Fort Benning Railroad, so far as I can see, will pay no less in taxes than the Central of Georgia paid for the use of the same facilities. We will doubtless be subject to whatever taxes are levied by the Federal and State Governments just as was the Central of Georgia.

Cross-examination.

By Mr. Cunningham:

Concerning what property we will have of our own when we get equipped as a common carrier and when we get a certificate; we will have a station which we have contracted to buy from you (the Central of Georgia), some tools and hand cars and some property leased from the Government, which will be Government property. Whether we will pay taxes on that I can not answer. I do not think that the State of Georgia will assess us on the railroad. All the property which we own will be that for which we agreed to pay $3,000, of which we have paid $500 on account, with the exception of the tools, and the property we have under lease, all of which belong to the United States Government.

We were asked to look into the service rendered by the Central of Georgia sometime in May or June, 1932, by the Commanding General at Fort Benning, General King. I suppose the Central of Georgia could do the same intra-Reservation service as we can, but the wages and other costs would probably be higher.

When I looked over the intra-Reservation service the Government was performing all of it and the Central of Georgia none. I suppose there is no reason why the Central of Georgia cannot combine the two, just like an individual. I can not say why it would not be more convenient

[fol. 282] for the whole work to be done by the agency performing the transportation from Fort Benning Junction to the Fort, except that the Government seems to think otherwise. I think we can do it more cheaply. One small carrier performing both the common carrier and intra-Reservation service on the ground is more efficient and economical than to have a trunk line railroad do both of these services within the Fort, even though that trunk line brings the majority of the traffic up to Fort Benning Junction.

The Central of Georgia has several lines into Columbus, has a large terminal at that point and a large number of engines and crews. Columbus is about ten miles from Fort Benning and about four miles from Fort Benning Junction. The Seaboard has only one track coming into Columbus, running, I think, from Richland. I don't know how many trains a day they operate over there. They have no terminals of consequence at Columbus going to the Fort; but I have seen six to ten locomotives in their yards, going back and forth.

I think the Central, the Seaboard and the Fort Benning Railroad are all fully equipped to perform this service. I don't think it takes all the equipment you have got by any manner of means. We have two or more locomotives, and if war-time service were required we could get additional cars either from the Central of Georgia or the Seaboard. The Seaboard would not have them in there; they would get them; they would have to haul them over from Fort Benning Junction.

If this application is granted we expect to make a fair and reasonable profit. I can not say just how much that will be. Mr. Capps did not state in dollars and cents what this would amount to, but I trust him to do what is right. I do not think he is going to do any more. I expect the Central to give us the same divisions that the Seaboard is giving us on coal and gas if I can get them. That is all in Mr. Capps' hands. I would not get anything that Mr. Capps won't give me. In one sense what we get will come from either the Seaboard or the Central of Georgia.

The Government is paying us $1,000 for the intra-Reservation service and is leasing to us all the equipment we need for $1.00 a year. While this is virtually giving us the equipment, we have to maintain the tracks and locomotives.

Whether the $21,000 which the Central of Georgia earned from its arbitraries last year would be a fair and just profit for us I can not say because I do not know what our operating expenses are going to be. The railroad's revenues will be shrunk by the amount of the arbitrary and the divisions. Even with the Central of Georgia's Superintendent located at Columbus, he being in charge of the physical [fol. 283] operation of the railroad, and with all the equipment he could get there, I do not think he could give as good service as we could. Our locomotives are at the Fort all the time ready to fire up and our general manager has nothing else to do except to give service, whether intra-Reservation or common carrier. I do not know why the Central could not put a man there, but they have not been doing so. The Central was not doing that kind of service at the Fort at all; it was not being paid for it. We are being paid $1,000 for what we are doing there; the Government formerly did this.

By Examiner Molster:

We are now operating the Fort Benning line as a contractor with the Government at a compensation of $1,000 plus $5.00 per car paid by the Government to the contractor (Page & Harris) until such time as we are granted a certificate of public convenience and necessity. Thirty days thereafter the $5.00 charge is taken off and we receive only a thousand dollars per month for the intra-Reservation service. Our divisions are out of the general rates.

The stockholders or incorporators of the Fort Benning Railroad are not connected in any way with the Army or the War Department, and only Mr. Harris and I, as officers and part owners of the Cape Fear Railroad at Fort Bragg. With reference to the statement that the Central of Georgia, when operating the line, excluded the Seaboard from participation in the traffic, Mr. Capps has already stated better than I can how that was done. I do not know about the details, but the net result was just that. Regarding negotiations for divisions with the Central of Georgia up to this time, about the last of November I conferred with Mr. Pollard and Mr. Cunningham and asked them if we could not get together without a hearing before the Commission in the hope that we could begin to make some profit out of our operation and relieve the Government of the

additional charge of $5.00 as soon as possible. With reference to the estimates of revenues and expenses shown in reply to question 31 of the questionnaire, the operating expenses were somewhat based upon the corresponding expenses that we have on the Cape Fear Railroad in North Carolina. The operating income is partly computed on the number of cars and partly on some of the figures furnished by the Central of Georgia in their petition to intervene. We can not say exactly what either expense or revenues will be.

I do not know when this line was built, but I think about 1918 or 1919.

(Thereupon the witness was excused.)

[fol. 284] Mr. HARRIS was then called as a witness for the Applicants.

Direct examination.

By Mr. Hitt:

My name is C. F. Harris, Fort Benning, Georgia. I am the Mr. Harris with whom the War Department executed its lease and operating contract to perform railroad service in Fort Benning. I am now performing such service as a contractor for the War Department, and have been since October 18, 1932.

Our operation at Fort Benning involves two types of service: (1) There is a considerable collecting and distributing service incident to the line haul. When the cars are brought into Fort Benning in the morning in the regularly scheduled morning train, which is due to arrive back at Fort Benning before 7:30 A. M., the train is cut at the station and cars are separately placed at the various warehouses which are assigned to the receipt of particular commodities. There are from 30 to 35 such warehouses besides unloading tracks for storage yards, etc., alongside the terminal tracks at Fort Benning. Some commodities, such as coal, hay, gasoline, auto fuel, oil, etc., are not handled in this way, the cars containing them being placed singly on track scales and their loaded weight recorded, after which they are placed at the proper warehouses or

unloading tracks. When these cars have been unloaded they are returned to the weighing scales and the empty cars weighed so that the actual loads may be computed.

Empty cars moving outbound are gathered at the various warehouses, and those to be weighed are placed on the weighing scales. Then the train is made up and it moves outbound to the interchange point at Fort Benning Junction. When there are outbound movements of loaded cars they are gathered in the same way and made up into the outbound train. This in the main constitutes the common carrier activity within the Fort Benning Military Reservation.

(2) The intra-plant activity consists of a large number of intra-plant movements, such as the handling of coal in Government-owned cars, movements of gasoline and fuel oil to the various points within the Reservation which is done by rail instead of trucks. Other commodities are similarly handled on Government-owned flat cars. From time to time supplies are transferred in freight cars from one warehouse to another. It is likewise required that the engine and crew be ready for all necessary transportation connected with military maneuvers within the Reservation not only for the regular garrison, but also for any special [fol. 285] maneuvers at Fort Benning for the Fourth Corps Area.

A considerable number of cars arrive loaded with various commodities, and the line haul service has probably ended when such cars are placed at the first warehouse to which one of the several commodities must go. After the first commodity has been unloaded the car moves successively on to other warehouses until all the commodities have been unloaded at their proper warehouse and the car emptied.

There are similar outbound movements of various commodities which are assembled at the several warehouses into single cars. These movements are probably intra-plant in their character and the assembling is handled in this way instead of trucking the commodities to one point of origin or distributing them from one point of destination by truck. This is a general description of the intra-plant service. The intra-plant and common carrier services in Fort Benning are performed over the same tracks. If one engine and crew was handling the common carrier service and another

handling the intra-plant service at the same time the two engines would be moving back and forth over the same tracks because the fuel, warehouse and scale tracks are so arranged that the main line would have to be used in reaching one from another. There would therefore be constant danger of one engine blocking the other, thus causing delay and confusion, particularly if each engine was responsible to a different authority.

The service we undertake to render to the Government is not limited to 8 hours per day. We are available to render 24 hours service as needed. Our engine and crew are available on short notice and without additional cost to the Government to move commodities or troops during maneuvers at any time of the day or night in intra-plant service, or to make emergency connections with the trunk line trains with which we are not scheduled to connect.

Cross-examination.

By Mr. Cunningham:

There is a morning delivery for the purpose of placing the cars within the Fort at the time the warehouse is open at 7:30. As a general proposition only one trip per day is made, but since we have been operating we have made several trips during the day to get carloads, etc. The service which we perform is to meet the delivery that the Central of Georgia makes there, which is the only one they make except special service to accommodate the Fort if needed. They notify us when they take the cars from the Junction. We have been operating the service since Oc-
[fol. 286] tober 18th.

Under our contract we have to give whatever service they demand. We make several special trips to take outbound cars loaded during the day and match them up with the trains passing through the Junction.

As a matter of fact there is only one service daily from the Railroad to Fort Benning, and that is in the early morning at 7:00 o'clock. There is double daily service when there are cars. The Central of Georgia delivers only once a day unless they call us up. If they want us to, we have an arrangement with the Yardmaster. If there are cars at Fort Benning to go out we call up (the rail lines) and if they are running something extra they call us up. So

far that is only occasionally. The regular daily service is once a day. This morning delivery was for the purpose of always having the cars placed at the various warehouses when they opened in the morning. That is the only one service a day. Fort Benning Railroad quits work at 4 o'clock.

I am not prepared to state whether there is any reason why the Central of Georgia can not switch cars out as we do. I can only judge by past performances. I know nothing about the conditions under which it was done. It is my understanding that the Government did some switching until the Central took the road over. I know they paid us $1,000 for intra-reservation service.

(Witness excused.)

Thereupon Mr. HALE was called as a witness for the Applicants.

Direct examination.

By Mr. Hitt:

My name is Arthur Hale, Barr Building, Washington, D. C. I began work as an apprentice in the Pennsylvania Railroad shops in Altoona many years ago, serving with that line a number of years, finally a Superintendent of Telegraph. Most of my experience, however, has been in the transportation department. I went to the Baltimore & Ohio as Assistant General Manager and General Superintendent of Transportation, and then became General Agent of the American Railway Association. In 1916 I was made Traffic Vice-President of the Consolidation Coal Company and at the same time Vice-President of the Cumberland & Pennsylvania Railroad. I am now in Washington in a consulting capacity for a number of small railroads and coal companies.

In the course of my experience I have become familiar with the operation of industrial railroads performing both a common carrier and intra-plant service. I was Chairman [fol. 287] of the Committee which framed the per diem rules governing the car hire charges of common carriers, in connection with which the subject of the industrial allowance between switching roads and common carriers was

of great importance. My experience in the Pennsylvania Car Record Office afforded me an opportunity to study the freight car question so that, as Chairman of the Committee on Car Service of the American Railway Association, I was in a position to advise as to the proper method of handling cars on switching and industrial railroads. In that work I had occasion to familiarize myself with the operation of a large number of those railroads which combined a plant facility with a common carrier service.

I have heard the testimony of previous witnesses, especially that of Mr. Harris. Assuming the facts and conditions to be as he states them, and the two types of service as he described them, these two services can, in my opinion, be more efficiently and satisfactorily performed by one engine and crew than by two and by a single organization rather than two.

(Witness excused.)

Thereupon Mr. POLLARD was called as a witness for the Intervenor.

Direct examination.

By Mr. Cunningham:

My name is Henry D. Pollard. When the license of the Central of Georgia to operate the Fort Benning Railroad was revoked I was President and General Manager of that Company, becoming Receiver on December 19, 1932.

(Thereupon Mr. Cunningham made the following statement:)

We want to introduce in evidence as Exhibit No. 10 the letter dated September 16, 1932, from Colonel Hall, Quartermaster Corps, notifying the Central of Georgia that its license was revoked, and as Exhibit No. 11 the enclosure received with the letter from Colonel Hall, consisting of a letter from the Secretary of War dated September 2, 1932. I want to call particular attention to the date of the enclosure).

(Exhibits Nos. 10 and 11 were received over objections by Mr. Hitt.)

(Mr. Cunningham continuing:)

We also wish to offer in evidence the original license, dated April 21, 1924, under which the Central of Georgia operated the Fort Benning Railroad. A copy of this is attached to the petition of intervention, and I should like to use that copy in lieu of the original. (It was agreed that this could be done and the copy attached to the petition of intervention was received.)

[fol. 288] Mr. Cunningham continuing:

I have some maps showing the situation which I think will be illuminating. The first shows the Fort Benning Railroad and its connection with the Seaboard and the Central of Georgia at Fort Benning Junction and the intra-Reservation lay-out. (The map referred to was received as Exhibit No. 12). We also desire to introduce a map showing the Fort Benning Railroad and its connection with the main line of the Central of Georgia and also the lines of the Central running into Columbus and the lines of the Southern and Seaboard Air Line. (The map referred to was received as Exhibit No. 13). We further wish to introduce a map showing in larger detail the connection with the Fort Benning Railroad with the Central and the Seaboard at Fort Benning Junction. (The map referred to was received as Exhibit No. 14). I also introduce a map showing on a larger scale the situation at Fort Benning proper. (The map referred to was received as Exhibit No. 15).

Mr. Pollard continuing:

By Mr. Cunningham:

Referring to Exhibit 15, the tracks marked in red are the United States Government tracks formerly leased to the Central of Georgia, the others in yellow are the United States owned and operated tracks. The latter we did not operate when we had our license from the Government.

The Central operates five lines into Columbus from Montgomery, Birmingham, Newnan, Macon and Albany. Columbus is about four miles from Fort Benning Junction. At Columbus the Central of Georgia has considerable railway yards, shops, cars and engines; a local superintendent, Mr. Claude Baldwin, is located there and has been for fourteen

years. He has jurisdiction over the Fort Benning operations.

Under the license to the Central of Georgia Railway the Railway was required to and did place all inbound freight at such warehouses and other places within the Reservation as might be designated by the Government. There were certain other tracks in the Reservation which were not operated by the Central, and these are shown in yellow on Exhibit No. 15. We were never requested to operate these tracks, we understanding that the Government preferred to do its own intra-terminal switching. We were paid nothing beyond the line haul charge for such deliveries as we did make in the Reservation. However, we did [fol. 289] have the facilities to do that intra-Reservation switching. For many years we operated joint passenger and freight service into Fort Benning. The passenger service I think was discontinued in 1929. The crew would go out of Columbus in the morning, taking all the business that there was to go, including the passenger cars, and they would remain at Fort Benning, doing the work there, and returning to Columbus in the late afternoon. While they were there the only work they did was to place such cars as the Government desired, and they were then idle until the time to move the empties in the afternoon. We could have done all the work that was done by the Government at the Fort with our crew, and they would not have been busy then. We were always willing, and are now willing, to do the intra-Reservation service at the Fort and would be glad to do it for the compensation of $1,000 which the Fort Benning Railroad gets. I think we would be more capable of performing that service than the Fort Benning people because we have the facilities and have been in the business for many years. We think we know the business well, from rendering the service that might be demanded of any railroad. I have had experience in handling large and small railroads, and I think I know what I am talking about. If it was necessary to have a crew out there all the time the Central of Georgia could absolutely do that.

It would be absolutely more convenient from every standpoint for the same railroad that performs the line haul service to do the switching. In my opinion it would be more economical and efficient for the train to start out from

Columbus with whatever business there is, take it to the Fort without interruption and there perform whatever service is to be done. The Central of Georgia, in connection with other railroads, performs such service for plants all over the United States.

When we took over the plant on June 15, 1924, the Fort Benning Railroad was badly run down. The Army people had been unable to get the necessary appropriations, so they told us, to keep the road in repair, and it was necessary for us, in the interest of safety, to spend $14,000 as quickly as we could in putting in about 10,000 cross ties and doing other necessary work to bring the road up to the standard of a good branch line. At that time the Seaboard Air Line was not capable of hauling this heavy traffic into Fort Benning. For many years it had bridges across two rivers, one on either side of Fort Benning Junction, which [fol. 290] prevented it from handling heavily loaded cars over that portion of their line. If the Seaboard had been the only connection which the Government railroad had they could not have delivered the traffic until 1928 or 1929 when the bridges were strengthened. Up to that time the Seaboard delivered heavily loaded cars to us for movement to points on their line, and we moved them to Americus and re-delivered them to their connection there. That, however, is no longer true.

Regarding Mr. Capps' comments on the mis-statement that the Seaboard had voluntarily removed its connection with the Fort Benning line, it was my understanding that this was a fact, but we find that to be incorrect and that the Central first removed the frog and switch from the Government-owned railroad. We did so, however, because no use was being made of it, and it was hazardous and caused maintenance expense. It could have been restored in a very short time. When the connection was cut the Seaboard was delivering its Fort Benning business to us at Columbus.

In addition to the cost of bringing the Fort Benning line up to proper condition for operation we made expenditures for additions and betterments. We were required by our revocable license to build a new depot and appurtenant tracks from plans approved by the Government at a cost of $13,673.56. Besides that we have put in many tie plates,

gauge rods and other things, having spent $17,234.75 in additions and betterments, including the depot.

We kept no accurate records for the maintenance cost of the Fort Benning tracks. We knew how many cross ties were used and generally what we spent, and estimated the maintenance cost to be about $6300.00 a year.

At one time we operated passenger service into Fort Benning, but this stopped on April 10, 1929. Thereafter we furnished the Fort with express and passenger service, taking this traffic out in a freight car for a while and later by truck.

The first intimation I had that the Government was going to cancel the license of the Central of Georgia was a telegram addressed to me at Portsmouth, Virginia, advising that an advertisement had appeared in the Columbus papers for the incorporation of the Fort Benning Railroad and later, on September 17th, I received a notice from the Government cancelling our revocable license. I was in Norfolk at the time and on September 19th I went to Washington and there saw General Williams. He said that the change [fol. 291] was being made because of unsatisfactory service and that, since the complaint came from Fort Benning, the way to get at the bottom of it was to go to Fort Benning and see the Commanding Officer. General Williams talked in a general way and gave me to understand that they had made some arrangements, or would make some arrangements, with the people who were doing the work at Fort Bragg. He gave me no details.

I then went to Fort Benning and there saw General King on the morning of September 21st. About a dozen Colonels and one or two Captains were present, and at the interview we requested them to give us specific instances of unsatisfactory service. As we got it, the only complaint was the fact that the double daily service had been discontinued in November, 1931. That service was actually discontinued on November 18, 1931. While that service was being performed an engine left Columbus in the morning, taking such business as was destined to Fort Benning and performing whatever service was required, and then returned to Columbus. In the afternoon another engine went out about 4:00 o'clock, gathered up the empties, performed any incidental work to be done, and returned to

Columbus. Generally the afternoon engine carried no cars for delivery to the Fort. They would take any special important business, but I would say that 99% of the time they had nothing. They simply gathered up the freight that had accumulated after the morning shift and brought it back to Columbus. Fort Benning originates very little freight. The outbound movement is comparatively very light. If the outbound traffic had not come out in the afternoon it would have been simply delayed until the next morning. Usually the whole lot was a mixed car of merchandise which reached our warehouse too late to be worked that day. The double daily service was discontinued for reasons of economy. After the discontinuance of the passenger service we were serving the Fort with a switch engine. We have an agreement with our men that switch service may be performed within a radius of ten miles. Fort Benning is within that radius and is properly switch engine work. Our men said it was not switch engine but main line work. They had mediators come in and, being sure that we were correct, we agreed to arbitrate. The case was heard before a third arbitrator, who, in my opinion, knew nothing about it, he decided against us, and we had to pay these men on the basis of main line pay, it costing us something like $12,000 in back time. The award [fol. 292] was for only one year, terminating in November, 1932, and we are now in a position to work Fort Benning with switch engines as we have always claimed we had the right to do. If this operation was road service we would have to pay our men on the basis of a minimum of 100 miles a day for an operation which is only ten miles out and ten miles back. The double daily service was discontinued in an effort to save this expense. Believing as we did and still do that the discontinuance did not inconvenience the Government in any particular, or cost them a penny, we endeavored to persuade them to our way of thinking. When we failed to do so we re-established the double daily service on February 26, 1932, and thereafter maintained it. The only thing accomplished by its restoration was to expedite the movement of cars which were 99.9% empty, and to save per diem to the Railroad but not the Government.

We therefore thought and still think that the Government was not inconvenienced in the least, and that is corroborated, to my mind, by the fact that the Fort Benning

Railroad is now giving the identical service which we were performing during the period when the Government complained of our failure to give double daily service. In other words the Fort Benning is making a single service now.

The conference on January 20, 1932, I referred to was the first time I heard of the recommendation that our license should be cancelled. The negotiations up to that time had been entirely with our local people and I personally knew neither of any complaint nor that the Fort Benning authorities had written the War Department requesting the cancellation of the license until we were told so by General King. Our local people did not know of this though they had a letter dated, I think, December 5, 1931, in which Captain Campbell, as I recall, said that unless we restored the double daily service he would complain to Washington and request the revocation. Some time later, I believe, he also complained that on a certain date our delivery was an hour and a half late because of an engine failure, which is not an extraordinary occurrence.

I had an interview with the Assistant Secretary of War, as the result of which he said that the matter would be re-opened at Fort Benning for further investigation. I asked General King to be permitted to be present at the [fol. 293] investigation and said that we would be glad to furnish any information that we had. We were not invited at that time nor was I or anyone else connected with the railroad present at any investigation that may have been held. Until I got the letter of September 16th the Government said nothing to me about the revocation. We never had an opportunity to negotiate with the Government on any different basis for handling their business. We are in a position, and have been at all times, to render the same service which the Fort Benning Railroad is now undertaking to provide.

With reference to your suggestion to Mr. Capps that if the Central should operate into Fort Benning and perform the Intra-Reservation switching the Seaboard could be put on a parity, there is no difficulty about this whatsoever from a practical standpoint. We do a great deal of switching into industrial plants for whose business the Seaboard competes with us. For instance, we own, jointly with the Seaboard, the Chatham Terminal Company, a four mile

railroad running from the yards of the Central and the Seaboard to the Savannah Warehouse & Compress Company, one of the largest concerns of its kind in the South. We handle, and have always handled, the business of the Seaboard and ourselves, the operation being joint for the Seaboard, the Southern Railway, the Atlantic Coast Line and the Savannah & Atlanta. Although there is an arrangement that the work may be alternated between the various interested lines, it has always been performed by us. We have similar arrangements at Montgomery, Alabama, where the Western Railway of Alabama performs all the service for the Central and itself, although we are keen competitors. Likewise, at Birmingham the Frisco performs service for the Central of Georgia, the Illinois Central and the Frisco, although all of the lines are heavy competitors. There are innumerable instances of that kind throughout the United States. Generally these things are satisfactorily handled. Occasionally there are complaints, as in the case of all services, but it is recognized to be more economical and efficient.

We are ready and willing to do the business into Fort Benning on exactly the same terms as the Fort Benning Railroad and give better service than the Page interests can possibly give. We would not charge the same rate as the Fort Benning is supposed to get out of the coal and [fol. 294] gas. We would be willing to take over the service, making Fort Benning a common point to the Central and the Seaboard and letting the Government route the business as it saw fit, and charge the Seaboard only whatever was the real cost of the service, taking into consideration whatever the Government paid us, presuming they would pay us as they do the Pages.

By Examiner Molster:

We would be willing to dispense with the arbitrary, charging the through rate from Fort Benning Junction.

I might say, with regard to the rates that Mr. Capps referred to in his original letter on the subject, that on coa from the Birmingham District for which, except for th Land Grant rates, they propose to pay Mr. Page 50¢ a to we got 6¢. On gasoline from Savannah he proposed to giv Mr. Page 33⅓% of the rate or, I understand, 12¢, we g 3¢.

Generally speaking, I have this to say. In an interview with Mr. Page, and, I think, with General Williams I said that I would be glad to take over the operation of the Fort Benning Railroad and perform the service personally just as the Page interests propose to do, and that I would exact nothing but the cost of service. In other words, the revenues of the long haul carriers would be the same as now, except that I would expect to be made whole on the operation. That I am willing to do now.

Cross-examination.

By Mr. Hitt:

My map Exhibit No. 13 does not purport to show all of the Seaboard and Southern tracks in Columbus, but only the relative preponderance of our lines into Columbus. We are not trying to belittle their facilities. The Central of Georgia's five lines into Columbus would, of course, be available to and from Fort Benning Junction in connection with the Fort Benning Railroad if that line operated the Fort Benning track.

Of the three depot locations in Fort Benning of which I spoke the first two were not expensive ones. We located them at places designated by the Army. They were temporary, but satisfactory.

Since 1924 we have spent something in excess of $17,000 for additions and improvements, and $14,000 for deferred maintenance, or a total of about $31,000, in addition to the current maintenance of $6,300. We figure that the arbi- [fol. 295] traries about paid the expenses and upkeep of the Fort Benning Railroad. We have our rate to Fort Benning Junction, which would be the same as the rate under the Fort Benning operation to Benning. In addition, we have this extra revenue which we will waive if permitted to go back and continue, or take the place of the Fort Benning Railroad. This revenue, which would run about $20,000 to $22,000 per year, we are willing to waive if we are allowed to continue the operation. We figure that just about takes care of the maintenance and operation. We did not voluntarily waive this charge, we did not have an opportunity to do so. If we had had an opportunity to bid on the property in competition with Mr. Page he would not be in operation of the railroad now.

If we waived the arbitraries we would still have the cost of maintenance.

The operating expenses included $12,000, the award of the arbitrator, that will not recur. I know what I am talking about in that connection. We are not compelled in theory or in practice to arbitrate. If we refused to do so and that resulted in a strike we would like to have one. You may think that a possibility, but I do not.

With reference to my discussion of the Chatham Terminal Company, that Company is the Central of Georgia and the Seaboard. It is simply a connecting company. I said that there were a number of other similar arrangements.

The Fort Benning track is owned by and belongs to the Government of the United States. It was paid for by the taxpayers, and, in my opinion the Government has no right to lease it to anybody or operate it for a profit, which they propose to do.

I think the Government should have had competition in the matter of the Fort Benning Railroad. Under the new arrangement they have it for the time being.

In the Chatham Terminal situation the movement from one track to another for local uses is done on a switching basis. It is a common carrier movement by the Central of Georgia. In serving Fort Benning the railroad can work on any terms we agree to. That is not the situation with the Chatham Terminal Company, but it is with the United States Government. In connection with the Chatham Terminal Company, there is some plant facility operation, but not much. Such as there is is not for the account of the Central of Georgia Railway itself. The Savannah Warehouse & Compress Company is owned by six line haul [fol. 296] carriers and the Central of Georgia does the switching for all. They have a common yard to which all of the lines deliver the business for the Compress Company. Our service for the Chatham Terminal Company is all performed under tariffs.

As to why the Seaboard Air Line had not been used, up to the termination of our license, on traffic into and out of Fort Benning, we were asked by the Government to and did take over the operation of the Fort Benning Railroad on June 15, 1924. The Government approached us, we did not approach them. The Government agreed that we could

make Fort Benning a local station on the Central of Georgia with the result that we might enjoy the long haul on all the business, and that has been the case. According to our records for the year ending August 31, 1932, the Seaboard handled 2,008 tons into and out of Fort Benning, for which they were paid $7,361.42. The agreement to make Fort Benning a local station on the Central of Georgia was the reason why we were given the long haul business. Business of the Seaboard for Fort Benning was delivered to us at Columbus. It was the agreement with the Government making Fort Benning a station on our line that shut out the Seaboard. If the Seaboard had wished to deliver to us at Fort Benning Junction we could have taken it there. As a matter of fact the business was handled in that way for quite a while. The Seaboard did not handle the business because it was a local station on our railroad. Of course, now it would be a local station on both the Central of Georgia and the Fort Benning Railroad. With reference to my proposal to apply the Junction rates to Fort Benning, as the Page interests proposed to do, my proposition was that if we were to operate the railroad we would expect the Seaboard to give us sufficient of their through rate to make us whole. We would have to get something out of the through rate to compensate us for our cost of operation. The difference between our doing that and the Fort Benning Railroad doing exactly the same thing is that the Seaboard and the Central are existing railroads both struggling for existence. Both are now in receivership. What the War Department proposes is for a disinterested party to come in between the Seaboard and the Central and perform a service over a railroad built by the Government which has no taxes on investments and will take away part of the revenue for which there is no neces-
[fol. 297] sity or justification. The difference is that in the one case Mr. Page is asking sufficient from the through rates to permit him to pay his personnel and to make a profit, whereas we are asking sufficient to let us pay our expenses. The Central of Georgia has never gone into business without expecting to make a profit. Here they would expect to be made whole in order to preserve their rights. The cost of operation and maintenance of the track would be about the same to either the Fort Benning

Railroad or the Central of Georgia. Our train service people would get a little more than the Fort Benning and to that extent the cost to the Fort Benning would be less.

My position is this. We were sufficiently close to the Army personnel at Fort Benning to be told when anything was wrong so that it might be corrected. The complaint which they made had never come to my attention, and was based upon a change which, in effect, was not a change because the identical service which they asked for had been restored. It was therefore manifest to me that the reasons given for the War Department's action were incorrect. That is not a matter of opinion but of record.

I figure that the Government will probably benefit by the new arrangement to the extent of $10,000 a year.

I feel, Mr. Hitt, to be very frank with you, that if there was anything to be done, we ought to have had the first shot at it; we helped to build Fort Benning from the beginning. We did anything and everything that the personnel at Fort Benning wanted done, and we have letters of commendation from every set of officers who have ever been at Fort Benning, commending the service of the Central. That being the case, it seemed to us that if the Government wanted to do anything different, they ought to have talked to us, to see what we would do instead of bringing in some third party.

Redirect examination.

By Mr. Cunningham:

The revenue figures given in the petition for intervention, showing that from traffic transported over the Central of Georgia's line and the Fort Benning line the Central of Georgia earned $136,570.38, that the tons hauled were 42,776, and that the proportion of the revenue accruing to the Fort Benning line was $21,541.31, are correct. The number of cars shown separately for coal, gas and oil for [fol. 298] the year ending August 31, 1932, are likewise correct.

By Examiner Molster:

I think the line from Fort Benning to Fort Benning Junction was constructed in 1918. I do not know why it was built by the Government rather than the Central of

Georgia or the Seaboard. It was in war time and everything was confused. As far as I know, the Central of Georgia was never requested to build the line. If they had been we would have done so.

The Central of Georgia did not obtain authority from the Commission in 1924 to operate over the line between Fort Benning and Fort Benning Junction, the Commission having decided that no permission was necessary.

(Statement by Mr. Cunningham:)

When we took over the operation of the line in 1924 Mr. Mahaffie suggested that we get a certificate. We called his attention to the fact that we had been operating the line in passenger service for a good many years and that for the added service which we proposed to take on beginning with 1924 there was no requirement of law for a certificate of public convenience and necessity. (Mr. Commissioner Mahaffie agreed with us.)

(Witness excused.)

Mr. KNAPP was called as a witness for the Intervenor.

Direct examination.

By Mr. Cunningham:

My name is W. McN. Knapp, Traffic Manager of the Central of Georgia Railway. I have a tariff showing the rates put in effect on June 15, 1924, when the Central of Georgia took over operation of the railroad. It is I. C. C. No. 2517, covering classes and commodities except coal from Central of Georgia mines to Fort Benning, Georgia, which is covered by I. C. C. Tariff No. 2518, also effective June 15, 1924. This latter tariff does not contain all rates on coal from Group 1 mines to Fort Benning, Georgia. They were the same as the rate of $2.89 per ton shown on this tariff.

After receiving a letter from the Coordinator of Traffic stating that the rates on certain commodities published in this original tariff of June 15, 1924, might be modified we conferred with Colonel Agnew of the office of the Quartermaster General, and Mr. Quigg, representing the Coordinator for traffic, and agreed on rates and arbitraries to be [fol. 299] applied from Fort Benning to Fort Benning Junc-

tion. With reference to the letter to which General Williams referred, written by Mr. Smither, Coordinator for the Secretary of War, dated August 5, 1924, complaining about certain rates in effect in that territory on June 15, 1924, reductions were subsequently made to the entire satisfaction of the Government. Subsequent to August 5th we had the conference with Colonel Agnew and Mr. Quigg and thereafter we published the lower rates. (Tariffs I. C. C. Nos. 2517 and 2518 were received as Exhibits Nos. 16 and 17, respectively. Tariff I. C. C. No. 2528 was received as Exhibit 18. Another coal and coke tariff, I. C. C. No. 2527, issued August 28, 1924, was received as Exhibit No. 19). Following the change in the tariffs at the request of the Government we received a letter dated September 5, 1924, from Mr. Quigg addressd to Mr. N. B. Wright, Assistant Freight Traffic Manager of the Central of Georgia, indicating that they were well satisfied with the rates thus established. (The letter referred to was received in evidence as Exhibit No. 20). In this letter the Chief Coordinator of Traffic says: Permit us to express our sincere appreciation of the conciliatory and friendly spirit displayed by your line in the adjustment of our complaint. We have never had any complaint from the War Department that we did not adjust rates to its satisfaction. We have made many changes they have requested.

With reference to General Williams' testimony that as to traffic handled over the Central of Georgia we would get the benefit of the long haul without reference to Land Grant rates, we equalized the long haul rate and the Land Grant rates applicable via any other route. We were required by the Government to apply the Land Grant rate to the proportion accruing from Fort Benning Junction to Fort Benning even where there was no competition. Even in the absence of a physical connection between us and the Seaboard we would have to equalize our rate with any Land Grant rate, where a Land Grant route existed, but not where such a route was not available.

In Mr. Capps' letter on the subject of coal rates in which he referred to an allowance of 50¢ a ton he based this allowance on the proportion, east of Montgomery of $1.42, of which 50¢ would be allowed the Page Railroad. The $1.42 proportion was based on his use of a rate of $2.59 per net ton from Group 1 Alabama mines to Fort Benning, whereas

the group rate was $2.40 per ton. In computing what the [fol. 300] allowances would mean for the year ended August 31, 1932, we used the actual rate from the Alabama mines, and not the $1.42 rate. In this connection paragraph 12 of the intervening petition should be corrected to show that the correct allowance would be 38¢ a ton instead of 39¢. That error would make a difference of $161.44. The amount stated in paragraph 13 of the intervening petition should be $36,134.72, instead of $36,296.16. The same ratio would not apply to other commodities; this is just coal.

So far as the movement of gas is concerned, Mr. Capps stated that he would make an allowance to the Fort Benning Railroad of 33⅓% moving from Savannah only. No gas was moving from Savannah and we made our computation on the basis of the traffic as it actually moved from Baton Rouge. If he would make an allowance on oil from Savannah I can not conceive any reason why he would not make an allowance from Baton Rouge, and in a letter dated September 26, 1932, he said he was disposed to allow the Fort Benning Railroad 33⅓% of the proportion from that origin accruing east of Montgomery. On this basis the allowance would be 16.3¢ per hundred pounds. (The letter referred to was received as Exhibit No. 21). Our calculations were based on the traffic actually moving from Baton Rouge. On oil our calculations were made on the assumption that the same allowance would be made out of the through rate, although Mr. Capps says he won't make any allowance. If he did make the same allowance the loss in revenue on oil would be correctly stated.

In making the arbitraries the general idea was to have rates apply, in the form of arbitraries, from Fort Benning to Fort Benning Junction, to compensate for the handling of freight. It was a matter of agreement with the War Department. Where they agreed that the arbitraries could be made we made them.

By Examiner Molster:

They never requested that it be done.

Cross-examination.

By Mr. Hitt:

When divisions are made between two lines each line gets a larger proportion than when there are 3 or 4 par-

ticipating lines. Therefore, the proportion the Fort Ben-
[fol. 304] ning would get on Baton Rouge oil will be very
much less than that which it would get from Savannah even
if the percentages were the same.

Redirect examination.

By Mr. Cunningham:

Up to the time our license was revoked our Fort Benning arbitrary on coal was 6¢ per ton, on fuel oil 2½¢ per hundred pounds, and on gas 3¢ per hundred pounds. In prorating divisions among common carriers consideration is given to capital investment, to the fact that the terminal line owns the property and has an investment in it, to taxes and all other elements entering into the ownership and management of common carrier railroads.

(Witness excused.)

Claude Baldwin was then called as a witness for the Intervenor.

Direct examination.

By Mr. Cunningham:

My name is Claude Baldwin, Superintendent of the Central of Georgia Railway, at Columbus. I had general supervision of the operations out of Fort Benning. We were and are now equipped to give the Government service, and there is no reason why we can not give as good or better service than the Fort Benning Railroad. We have ample shipping facilities, plenty of locomotives, cars and men at Columbus, and keep the locomotives in steam and crews on duty at all times.

If it was necessary to have a crew at Fort Benning we could get it out there in an average of about 40 minutes. This is much quicker than they could get an engine at Fort Benning if they had one there. We have engines hot all the time.

We were accustomed to give double daily service to Fort Benning, sending an engine out there at four o'clock in the afternoon and about seven o'clock in the morning. The four o'clock engine very rarely hauled traffic in. There was

no need to send it in the afternoon, because there was no one there to handle it. We stopped the double daily service in November, 1931. The afternoon engine generally took empty cars from Fort Benning, with, as a rule, one merchandise car which was loaded at the warehouse.

I was the man with whom the Quartermaster General at [fol. 302] the Fort had the correspondence with reference to the discontinuance of the double daily service. The run would cost about $60.00 on the one hundred mile basis. I was endeavoring to show the authorities at the Fort that this saving was justified in view of our financial condition.

I received a letter written December 5, 1931, stating if we did not restore the double daily service recommendation would be made that our license be cancelled.

By Examiner Molster:

I did not say anything to Mr. Pollard at that time, since we were trying to thrash it out without disturbance.

By Mr. Cunningham:

We acceded to the request on February 26, 1932. At that time I had not heard of a letter to the Government at Washington written the previous January 20th advising of the cancellation of the license. I first heard of this letter when I was with Mr. Pollard, Mr. Wood and you in General King's office at the Fort.

The complaint in the letter of December 5th about a train's being late at the Fort arose from an engine failure on the Fort Benning track. We could not get in any earlier. I explained this to the people at the Fort and I presumed the explanation was satisfactory, hearing nothing more from them. These were the only complaints that I ever received out there.

The Railroad has uniformly given good service and complied with the law. We often made special deliveries out there when desired. When the train came in in the morning we quite often ran special trains out there to meet them. The service which is now being given by the Fort Benning Railroad is not the daily double service we gave when we had the license. They are making only one trip a day, which is exactly the same kind of service they complained of our giving. (It was agreed that the Applicant would have the right to produce evidence of other complaints of said serv-

ice made to the Central of Georgia and that the Intervenor would have an opportunity to file in the record an explanation of those complaints by letter.)

Mr. Wood was called as a witness for the Intervenor.

Direct examination.

By Mr. Cunningham:

[fol. 303] My name is T. P. Wood, Division Freight Agent, Central of Georgia Railway, Columbus, Georgia. I have served in that capacity since November, 1908. I was in Columbus all the time during the operation of the Fort Benning Railroad and was the man that came in contact with the officials at the Fort and to whom all inquiries were directed with regard to the movement of their freight.

So far as concerns my contact with the Fort Benning officials our service has been satisfactory except in one instance, that being a complaint from a Captain who said he wanted the double daily service. I told him we would give it to him the next day. I wrote the Captain a letter asking him to let me know of any complaints and we would take care of them. We gave him special service many, many times. We would take any special shipment that they requested to be put on a special train to expedite the movement. I never heard of any complaint except concerning the stopping of the double daily service in November, and if there had been such complaints I would have heard of them.

The first I heard of the cancellation of the licence was from a newspaper notice, that is the charter in the newspaper and a news item. I did not know about that previous to the time that Mr. Pollard, Mr. Baldwin, you and I saw saw the Quartermaster General in his office and learned that the letter of June 20th had been written.

(Witness excused.)

Mr. Hitt stated to the Examiner that the assignment of the lease to the Applicant had not yet been approved by the Secretary of War.

Mr. C. F. Haunts, witness for the Applicant, recalled.

Direct examination.

By Mr. Hitt:

We make a practice of keeping our engine at Fort Benning under steam at all times. So far we have had no occasion to move it at night, the latest movement I think being about 4:30. I am subject to the orders of the Quartermaster General, and this practice is a part of my contract.

One of our crews lives between Fort Benning Junction and Columbus and the other in Columbus. I live in Columbus and I can call them by telephone. The Quartermaster General would call me.

(Witness excused.)

[fol. 304] Mr. Claude Baldwin, witness for the Intervenor, recalled.

Direct examination.

By Mr. Cunningham:

The cars used on the Fort Benning Railroad are those of the different carriers that handle them in there. We are responsible for the per diem on cars we deliver. We are not collecting the per diem money from either the Fort Benning Railroad, or the Government, or anyone else.

(Thereupon the hearing was closed.)

Exhibits Introduced in Evidence in Finance Docket No. 9709

Recital as to Omission of Certain Exhibits

All of the Exhibits introduced in evidence before the Interstate Commerce Commission in Finance Docket 9709, Nos. 1 to 22, both inclusive, are here copied with the exception of Exhibits Nos. 12 to 15, both inclusive, which are omitted for the reasons hereinbelow stated.

Exhibit No. 10. This exhibit, which is a map showing the Fort Benning Railroad and its connection with the Seaboard Air Line and Central of Georgia Railway at Fort Benning Junction and the intra reservation layout of the track, is not copied, as this description thereof is deemed sufficient.

Exhibit No. 11. This exhibit, which is a map showing the Fort Benning Railroad and its connection with the main line of Central of Georgia, is not copied, as this description thereof is deemed sufficient.

Exhibit No. 12. This exhibit, which is a map showing in large detail the connection of Fort Benning Railroad with the Central of Georgia Railway and the Seaboard Air Line at Fort Benning Junction, is not copied, as this description thereof is deemed sufficient.

Exhibit No. 13. This exhibit, which is a map showing on a larger scale the track layout at Fort Benning proper, is not copied, as this description is deemed sufficient.

(fol. 303) Exhibit No. 1

Fort Benning A Small Town

The Fort Benning Military Reservation consists of an approximately 98,000 acres, located in Muscogee and Chattahoochee Counties, Georgia, with a population of between 7,500 and 8,000 officers and their families, enlisted men and their families, and civilian employees and their families. Approximately 1,000 head of stock, horses and mules, are stabled at Fort Benning. The Infantry School and the Tank School are both at Fort Benning. Fourth Corps Area annual maneuvers, R.O.T.C., and C.M.T.C. camps are held annually at this station. The annual turn over of officers and enlisted men at this station consists of the following: Approximately 300 officers with dependents leaving annually; 300 officers with dependents arriving annually; 240 officers including National Guard and Organized Reserves, reporting annually without dependents; 240 officers without dependents departing annually; 60 enlisted men of the National Guard and Organized Reserves reporting annually; and 60 enlisted men of the National Guard and Organized Reserves departing anually. The in and

out bound freight at this station will approximate 2800 car loads per year, consisting of gasoline, oil, coal, ammunition, clothing and equipage, subsistence, impedimenta, and household goods, in addition to building material for con [fol. 206] tractors used in connection with erecting permanent buildings. A large amount of construction will be done during the next twelve months. The construction program extends through 1940. About one half of the inbound shipments are moved on government bill of lading, the balance being moved on commercial bills of lading.

Exhibit No. 2

Headquarters The Infantry School

Office of the Quartermaster, Fort Benning, Georgia

January 26, 1932

Subject: Revocation of license granted Central of Georgia Railway Company.

To The Quartermaster General, Washington D. C. (Thru The Commandant, The Infantry School, Fort Benning, Georgia):

1. Since April 21, 1924, rail transportation service has been furnished this post by the Central of Georgia Railway Company under a revocable license granted it under date of April 21, 1924, by the then Assistant Secretary of War and accepted by the licensee under date of June 13, 1924.

2.a. Licensee, on November 18, 1931, made a change in the rail transportation service theretofore being furnished by it, constituting a diminution in such service to the disadvantage of the Government. This reduction was made for the convenience of licensee and of its own arbitrary initiative, without warning and without having consulted the convenience of the Government. (See incl. 1.)

b. Immediately upon being notified of such change, the Government agent informed licensee by letter, dated November 20, 1931 of the scheduled transportation service

requisite, and desirable for the Government needs and asked to be advised if it would be put into effect (see incl. 2).

c. By letter dated November 21, 1931, licensee advised the Government's agent that the schedule outlined in his letter of November 20, 1931 (Incl. 2), was satisfactory (see incl. 3).

3. a. Licensee has failed and neglected to provide and maintain this agreed schedule, having furnished only half the scheduled transportation. This resulted in 12 hours delay of shipments, LCL and carload lots, from this Post and 24 hours or more delay in delivery to connecting carrier (see incl. 4).

[fol. 307] b. The Government's agent, by letter dated December 5, 1931, advised licensee of the inadequacy of its service, and the requirement that it be furnished in accordance with fixed schedule (see incl. 2). Further, licensee was informed "Unless efficient and satisfactory service is resumed at once, the necessary steps will have to be taken to have the present existing license revoked" (see incl. 5).

c. By letter dated December 16, 1931, the licensee acknowledged receipt of said letter of December 5, 1931, and sought to avoid, in fact ignored, the main issue by presenting for consideration explanations and arguments moving to the advantage of the licensee. The needs of the Government were not considered, only what cost it would entail to the licensee (see incl. 6).

4. The transportation service being furnished by the licensee to the Government is inadequate to its needs, costly to it and not commensurate with its reasonable requirements, the financial returns for which adequately, if not handsomely, remunerate the licensee for the service required of it under said revocable license. Accordingly it is recommended, that:

a. Said revocable license granted the Central of Georgia Railway Company, under date of April 21, 1924, be revoked. And

b. That competition be invited between the Seaboard Air Line Railway Company and the Central of Georgia Railway Company. The main lines of these Railway Com-

panies and the Government railroad from this post join at Fort Benning Junction. And

c. That a new revocable license making definite provisions for the Government's transportation and switching service requirements be granted for a fixed period of years to one of the Railway Companies offering the most advantage to the Government, as its licensee. Or

d. That the Quartermaster at this station be authorized to furnish the rail transportation and switching service upon the Government tracks up to their Fort Benning Junction. (For this purpose the switch engine and crew now maintained by the Government at this station are adequate.) If this is granted it will be necessary that the Quartermaster at Fort Benning be allotted funds necessary for the maintenance of right of way of Government owned trackage. The saving to the Government will more than [fol. 308] offset this cost of maintenance.

E. D. Barlow, Lt. Colonel, Q.M.C., Acting Quartermaster.

A True Copy. J. H. Mellom, Major, Q.M.C.

Inclosure to Exhibit No. 2

Headquarters The Infantry School

Office of the Quartermaster, Fort Benning, Georgia

November 20, 1931.

Mr. C. Baldwin, Supt., Central of Georgia Railway Co., Columbus, Georgia.

Dear Sir:

Replying to your letter of November 18th, File 175-18-A, addressed to Colonel Chas. L. Willard, Camp Quartermaster, Fort Benning, Ga., it is noted that mention of schedule covering arrival and departure of trains at Fort Benning is not mentioned. The schedule desired, and which the Government is entitled under revocable license, is as follows:

Train should arrive at Fort Benning in time to permit spotting of cars by your engine and crew at unloading point designated by the Quartermaster not later than 7:30 A. M. daily except Sundays and holidays.

Shipments from Fort Benning should be moved between 1 (0) P. M. and 6 (0) P. M. on the same day that billing is given your agent at Fort Benning.

Will thank you to advise if the schedule as outlined above will be put into effect by your company.

Yours very truly, E. H. Barlow, Lt. Colonel, Q.M.C., Acting Quartermaster.

A True Copy. J. H. Mellom, Major, Q.M.C.

Inclosure to Exhibit No. 2

Central of Georgia Railway Company

Columbus, Ga., November 21, 1931. 10m

File 175.18 A

Col. 3(0) Lt. Col. E. H. Barlow, Acting Quartermaster, Q.M.C., Fort Benning, Georgia.

Dear Sir:

This will acknowledge receipt of your letter November twentieth.

The schedule as outlined is satisfactory and we will make every effort to meet it on time, and I am sure there will be no trouble in our doing so.

Yours very truly, C. Baldwin, Superintendent.

A True Copy. J. H. Mellom, Major, Q.M.C.

Inclosure to Exhibit 2

Headquarters, The Infantry School

Office of the Quartermaster, Fort Benning, Georgia

December 5, 1931.

Mr. Claude Baldwin, Superintendent, Central of Georgia Railway, Columbus, Georgia.

Dear Sir:

The Central of Georgia train due to arrive today at 7:40 A. M. did not arrive until 8:31 A. M., one and one-half hours later, causing annoying delay and corresponding loss

of time in spotting cars due to be unloaded. In addition, due to switching, the locomotive crane was delayed at least two hours in commencing unloading operations.

This type of service, coupled with the fact of not receiving afternoon train and switching service, is not at all satisfactory. Service furnished by your road must be in accord ance with schedule as outlined in our letter of November 9, 1931.

Unless efficient and satisfactory service is resumed at once, the necessary steps will have to be taken to have the [fol. 216] present existing license revoked.

For the Quartermaster

Yours very truly, S. B. Campbell, Captain, Q.M.C. Assistant.

A True Copy. J. H. Mellom, Major, Q.M.C.

Inclosure to Exhibit No. 2

Headquarters, The Infantry School

Office of the Quartermaster, Fort Benning, Georgia

November 30, 1931.

J. C. Baldwin, Supt., Central of Georgia Ry. Co., Columbus, Georgia

Dear Sir:

Referring to letter from this office dated November 26th, and your reply of November 21st, File 175-13-A, with reference to switching schedule at Fort Benning, Ga., Par. 3 of letter from this office dated November 26th reads:

"Shipments from Fort Benning should be moved between 4:00 and 6:00 P. M. on the same day that billing is given your agent at Fort Benning, Ga."

This service has not been given by your company.

At present your train is making one trip daily to Fort Benning. Shipments, LCL and carload, are at least 12 hours late in being moved from Fort Benning, and 24 hours or more in delivery to connecting line. Service of this kind is not satisfactory, and you are again advised that this

office expects service in reference to switching at this post as outlined in our letter of November 20th.

For the Quartermaster:

S. D. Campbell, Captain, Q.M.C., Assistant.

[fol. 311] A true copy. J. H. Mellom, Major, Q.M.C.

Inclosure to Exhibit No. 2

Central of Georgia Railway Company

Office Superintendent Columbus Division

C. Baldwin, Superintendent.

Columbus, Ga., December 16, 1931. rm.

File 175-18-A

Captain S. D. Campbell, Assistant Quartermaster, Fort Benning, Georgia.

Dear Sir:

Replying to your letter December 5:

I have been delayed in answering this because I wanted to talk with you before doing so. I was out to the Fort this afternoon and sorry to find that this was your day off, which prevented my seeing you.

I can appreciate the late arrival of our train on the 5th causing you some inconvenience and regret the occurrence, but this was an unavoidable delay and could not be helped. However, since that time I think we have been there on time or ahead of time each morning.

As to the afternoon service, I am sure you appreciate the financial situation of the railroads today and the struggle that we are making to keep our heads above the water, and to make an afternoon trips would mean a considerable expense to us, and which service we had hoped to be able to overcome by giving you the one switch per day. The business that moves from the Fort by the morning train makes the same time identically that it would if moved in the afternoon. The majority of the cars, as you know, are empties, and only the less than carload merchandise is moving now. Our agent has very positive instructions that when you have important freight in solid cars that should move to notify the chief dispatcher, who will see that after-

noon service is performed, regardless of what it costs us.

We want to give reasonable service, and since you understand what the extra trip would cost us I do not believe you will insist on the two trips per day. If we send an engine in the afternoon we would of course have to call a crew, for which we would have to pay 100 miles, which [fol. 312] would mean in dollars and cents about $26.00 in wages, to say nothing of the cost of fuel and other expense.

We were giving you service, as you probably know, before the switch engine took over the work, with a road crew and all the service we were able to get from this crew was that performed at Fort Benning; and with the arrangement we now have in giving you the one switch a day, which is done by a road crew operating between Columbus and Americus, it fits in all right with your work. As I told you personally, 99 per cent of the time they will be there on time or ahead of time. We have endeavored not to get them there before 7:00 in the morning because we thought that would be the most desirable hour to arrive.

While we said to you that we would give the afternoon service, this we meant when necessary, and we still say that if the afternoon service is necessary we will give it, but we hope, since you understand our situation, that you will not insist on it except when there is some good reason for it.

I shall be very glad to come out and discuss the matter with you and will probably be able to show you more fully just what it does mean to us.

Yours very truly (Sgd.) C. Baldwin, Superintendent.

A true copy. J. H. Mellom, Major, Q.M.C.

EXHIBIT No. 3

Office of the Chief Coordinator, Washington

The Honorable, The Secretary. August 5, 1924.

MY DEAR MR. SECRETARY:

The following letter received from the Coordinator for Traffic is quoted in full:

"In establishing Ft. Benning, Ga. (Near Columbus, Ga.) the Government constructed, as a necessary facility in the

[fol. 313] operation of that activity, 11 miles of standard gauge railroad. Approximately 6 miles was necessary to connect the Fort with the Central of Ga. and Seaboard Air Line Railroads at Ft. Benning Junction, Ga., the balance, 5 miles, represents tracks serving warehouses, coal bins, shaching shops, etc.

"Prior to June 15, 1924, all of the Government's freight traffic, either to or from Ft. Benning, was transported by the Government over its railroad with its own power and its traffic was delivered to or received from the Central of Ga. or Seaboard Air Line at Ft. Benning June.

"Effective June 15, 1924, the Central of Ga. published a freight tariff (U. F. O. No. 625 I. C. C. No. 2517) making the following rates applicable on all the Government's traffic between Ft. Benning Junction and Ft. Benning.

"Class Rates in Cents per One Hundred Pounds

Class 1	Class 2	Class 3	Class 4	Class 5	Class 6	Class A	Class B	Class C	Class D
8¢	7¢	6¢	5¢	4¢	4¢	3¢	4¢	2¢	2¢

Commodity Rates in Cents per 100 Pounds, Except as Noted

Cement	2¢	Lime	2¢
Coal	30¢ per ton	Lumber	2½¢
Fertilizer	40¢ " "	Sand Gravel	30¢ per ton

The rates shown above are in addition, that is added, to the rates published by the Central of Georgia and Seaboard Air Line on traffic handled by those lines to or from Ft. Benning Junction, Ga.

"The tariff published by the Central of Ga. on traffic between Fort Benning June. and Ft. Benning is, I understand 'the result of a revocable at will license', granted by the Secretary of War to the Central of Ga. Rd. under which that line is given the use and operation of the Government tracks to be kept and maintained in good order by the Cen. of Ga. except that portion 'lying South of Wold Avenue, and that portion extending from hay sheds to round house', to be maintained by the Govt.

"As the operation of the Government tracks into the Ft. Benning by the Central of Ga. will apparently increase considerably, the cost to the Government over that under

the previous Government operation, it is believed that under Circular 41 of the Bureau of Budget, and as a matter of coordination, that your attention should be called to this situation.

"The advantage to the Government is not apparent from [fol. 314] a cost of transportation point of view. If the present rates applied to Ft. Benning Jct. were made applicable to Ft. Benning it would furnish a consideration fully justifying, from a traffic point of view, turning this piece of track over to the Central of Ga. for operation by them. There is nothing in the license with respect to the rates to be charged by the Central of Ga. They appear to be at liberty to fix the rates from their viewpoint. A review of the number of car load shipments in and out of Ft. Benning for a period of 10 months (Jan. 1, 1923 to July 1, 1924) routed by this office shows a total of 514 carloads. At the rates established by the Central of Ga. it represents an increase added cost of $16,000 in even figures. When the cars routed by the Q. M. C.'s Office and the less than carload traffic is added I feel sure that an estimated cost of $1,000 per month, $12,000 per year is very conservative. As an example of what the increase in cost will be, attention is called to the rate on coal 30c per net ton equal to $15.00 per car. At the present time we have request for routing for 212 carloads of coal. The rate on this coal from the mine to Columbus, Ga. (4 miles west of Ft. Benning Jct.) is $2.09 per net ton, to Ft. Benning Jct., it is $2.59 per ton; to a Central of Ga. Sta.. miles east it is the same, whereas under the new arrangement it will be $2.89 per ton to Ft. Benning.

As against the cost the saving to the Govt. in the cost f operating this line, between the June. and the Post, e., maintenance of track, wages of engineers, firemen, ngine, fuel, oil, etc., at a liberal estimate should not exceed 4,000 per year; even if $5,000 per year is allowed there s a balance in favor of Govt. operation of $7,000 per year.

The cost of track maintenance should not be anything approximating the same cost to a railroad like the Central f Ga., as the same standard is not required. the Govt's line s not a common or public carrier, all that is necessary is keep it in condition for reasonably safe operation.

It is my information that in addition to the 11 miles of standard gauge track there is in operation at the Post [illegible]

miles of narrow gauge track used for transporting men and ammunition to the several rifle ranges, and in addition material such as sand-gravel, cross ties, etc., for use at the Post. This track must be maintained up to a standard of safety and with the maintenance of approximately 2,000 ft. of the standard gauge within the Post hay sheds and [fol. 315] machine shops (excluded in the license to the Central of Ga.) the overhead cost of maintenance would be increased very little, if any, in caring for the maintenance of the warehouse tracks, and the track to Ft. Benning Junction. The Govt. maintains quite a complete machine shop at Ft. Benning for repairing locomotives. A number of locomotives have been sent to Ft. Benning for repairs and returned at a cost of less than one half of what it would have cost at the posts where the locomotives were in use. There are now 7 standard gauges and 10 narrow gauge locomotives at Ft. Benning. As a locomotive would always be available for hauling cars to and from the Junction, it would appear from the information at hand that the operation of the Government road by the Central of Ga. would be a liability in place of an assets."

I invite your attention to this letter stating that the new rates for the handling of Government freight to and from Ft. Benning, Ga., in consideration for the care and operation by the Central of Ga. Railroad of a part of the Government owned tracks to that Post, will result in greater expense to the Government.

If an agreement has been entered into under terms as stated and the effect in operation is correctly reported, and unless advantages which are not apparent to this office are to be gained by it, sufficiently important to justify the additional expenditure of Govt. funds, it is important to justify the additional expenditure of Govt. funds, it is believed that the agreement should be modified or terminated. Accordingly the question is referred to you for further consideration.

This office will appreciate information of your decision and action.

Very sincerely yours, H. C. Smither, Chief Coordinator.

1st Ind.

War Dept., Office of the Assistant Secretary, August 11, 1924. To The Quartermaster General:

1. Forwarded for full statement of the facts, together with recommendation.

By direction of the Assistant Secretary of War.

E. D. Peek, Lt. Colonel, C. of E.

Exhibit No. 4

[fol. 316] General Accounting Office, Washington

April 30, 1926.

Quartermaster General, U. S. Army, Washington, D. C.

Sir:

This office has vouchers covering 235 cars of coal transported in June and July 1925 from Dora, Ala., to Ft. Benning, Ga., all moving Frisco to Birmingham, Ala. and Central of Georgia Railway beyond, direct to the camp.

St. L., S. F. L. C. C. 8096 quotes a through rate of $2.65 per ton with routing only via Birmingham and C. of G. It will be observed no land grant earnings are derived via this route. However, the carrier presented its bill for freight charges on basis of a combination rate of 79c to Birmingham and $2.65 beyond. The $2.65 rate is applicable via L. & N. and C. of G. via Montgomery, permitting land grant earnings and nets $2.51 per ton through.

L. C. C. 8096, referred to above, quotes a rate of $2.59 from Dora to Ft. Benning Jct., applicable via Birmingham. L. & N. to Montgomery and Seaboard Air Line. Note this rate applies to the Junction only, and while it permits of a land grant deduction of fifty percent of the earnings of the L. & N. R. R. Co. from Birmingham to Montgomery, the use of the rate requires an additional charge from the

Junction to Ft. Benning proper of 30¢ per ton, and results in a net rate of:

To Birmingham	47		
Montgomery	85	LG 50%	42.5
F. B. Jct.	1.27		
Beyond	30		
Gross	2.89		
L. G.	.425		
Net	2.465		

G. F. A. McConnell, April 22, 1926, file 83578-W, agrees to refund on this basis.

It will be further noted that I. C. C. 8096 also quotes via C. of G. at Birmingham a through rate of $2.59 to the Junction, the published rate to Ft. Benning proper being only 6 cents over the rate to the Junction. Having in mind the fact of the C. of G. operating the Government tracks from the Junction, it appears that the carrier is using this circumstance to its advantage and to the disadvantage of the government because the necessity for the use of the 30c in combination beyond the Junction precludes the Sea- [fol. 317] board securing a share of the business. If the through rate of $2.65 should be published applicable via Montgomery and Seaboard, the net rate would be $2.225, or 24c less than the rate in settlement agreed to by the C. of Ga. It is not suggested that the $2.65 rate be published via Birmingham, L. & N., Montgomery and Central of Georgia, but that the Seaboard be given an opportunity to handle on a competitive basis the business via Montgomery to the Camp proper. Once such a rate and route is established, then the C. of G. must equalize via Birmingham and its own line the net rate via Montgomery and Seaboard.

In view of the volume of the movement perhaps the Seaboard would authorize publication of the $2.65 rate via Montgomery, if brought to its attention and your office being familiar with the circumstances surrounding the operation of the government tracks at the Camp may be

in a position to induce the C. of G. to accede to the publication of the $2.65 rate via a competitive route.

The question is submitted for your discretionary action.

Respectfully, J. R. McCarl, Comptroller General, by (Signed) L. M. Moore, Chief, Transportation Division.

EXHIBIT No. 5

Headquarters the Infantry School

Office of the Commandant, Fort Benning, Georgia

October 1, 1932.

The Assistant Secretary of War, Washington, D. C.

MY DEAR MR. SECRETARY:

The Central of Georgia Railway was definitely advised of the imperative necessity for the maintenance of a two-train daily schedule and that noncompliance would result in a request for the revocation of their license.

In response to the complaint that the railroad was not informed of my recommendation that their license be re- [fol. 318] voked, attention is invited to the fact that the letter of December 5, 1931, acknowledged under date of December 16, informed them that such a recommendation would be submitted unless the schedule as agreed upon was reinstalled "at once". However, the request was not submitted until January 20, 1932, more than a month after the information of my proposed action had been received by them.

As a subordinate administrative agency of the War Department, I felt that my duty was to make recommendations to those authorities charged with the problem of committing the government in licenses and the corresponding revocation of such commitments and having done so, the matter was without my province except as further action was directed by higher authority. To have acted otherwise would seem unethical and unmilitary.

Very respectfully, (S.) Campbell King. Major General, U. S. Army, Commandant.

A True Extract. E. D. Ellis, Major, Q. M. C.

Exhibit No. 6

War Department

Office of the Assistant Secretary, Washington, D. C.

9/25/24.

Chief Coordinator, Washington, D. C.

Dear Sir:

With reference to your communication of September 11, 1924, in connection with communications of August 5th and August 15, 1924, on the subject of freight rates to be charged by the Central of Georgia Railway Company on freight moving to or from Fort Benning, Georgia, the new rates submitted by the Central of Georgia Railway are, for the present, accepted by the War Department, and routing instructions are in process setting forth how freight traffic into and out of Fort Benning should be routed.

Sincerely yours, (Signed) Dwight F. Davis, The Assistant Secretary of War.

Copy for Assistant Secretary of War.

[fol. 319] Exhibit No. 7

Headquarters the Infantry School

Office of the Quartermaster, Fort Benning, Ga.

November 24, 1926.

Subject: Freight Rates, to and from Fort Benning, Georgia

To Quartermaster General, Washington, D. C.:

1. As a matter of information, it is advised that in 1923, at the time revocable license was issued to the Central of Georgia Railway Company authorizing exclusive use of Government owned right of way from Fort Benning Junction to Fort Benning, Ga., and certain tracks installed at Fort Benning, it was understood by this office that through rates advantageous to the Government on freight shipments to and from Fort Benning, would be published as soon as tariffs could be prepared and approved by the In-

terstate Commerce Commission. To date no through rates have been published and combination of local rates are still in effect on all freight shipments to and from Fort Benning, Ga. As a matter of fact class rates from Columbus, Ga., to Fort Benning, Ga., and vice versa, have recently been increased.

2. In view of the large amount of business handled in and out of Fort Benning, it is the opinion of this office that through rates should be published applying to and from Fort Benning and that these rates should not be any higher than the Columbus, Ga., rates.

(Signed) A. B. Warfield, Lt. Colonel, Q. M. C.;
Quartermaster.

Extract No. 8

Seaboard Air Line Railway

Norfolk, Va., August 24, 1932.

Personal and Confidential

Mr. Henry A. Page, Aberdeen, N. C.

Dear Sir:

This is in confirmation of our conversation of this afternoon respecting divisions of certain revenue on traffic destined to Fort Benning, Ga. via the point of interchange to be established (near Fort Benning Junction) between [fol. 320] the Seaboard and the railroad to be incorporated and operated by Mr. Henry A. Page, Jr., all, of course, subject to the issuance by the Interstate Commerce Commission of a Certificate of Public Convenience and Necessity for said railroad.

The following figures are also based upon the application of current Fort Benning Junction rates to Fort Benning proper:

The current rate on coal from Alabama Group One mines to Port Benning Junction is $2.39 per net ton. In the division of this rate $1.42 accrues east of Montgomery. We are willing to sub-divide this proportion of $1.42—92 cents to the Seaboard and 50 cents to the Page Railroad. In event as a result of changes in rates or divisions the proportion

of $1.42 east of Montgomery should be increased or decreased, the sub divisions will be correspondingly changed on a revenue basis.

The current rate on refined petroleum products, carloads, from Savannah, Ga. to Fort Benning Junction is 36 cents per 100 pounds. We are willing to divide this rate 66⅔% to the Seaboard and 33⅓% to the Page Railroad. Should this rate of 36 cents be increased or decreased, these same percentages will apply in the division of the new rate.

Yours very truly, (Signed) C. R. Capps, Chief Traffic Officer.

Exhibit No. 9.

Seaboard Air Line Railway

Norfolk, Va., Sept. 23, 1922.

Personal

Mr. W. M. N. Knapp, T. M., Central of Georgia Railway, Savannah, Ga.

Dear Mr. Knapp:

Referring to our conversation regarding proportions to be allowed the Fort Benning Railroad, I quote the following from a letter I recently wrote Mr. Page covering divisions on coal from Alabama Group One mines and on refined petroleum products from Savannah:

"The current rate on coal from Alabama Group One (or 307) mines to Fort Benning Junction is $2.50 per ton. In the division of this rate $1.42 accrues east of Montgomery. We are willing to sub divide this proportion as $1.42 1/2 cents to the Seaboard and 50 cents to the Page Railroad. In event as a result of changes in rates or divisions the proportion of $1.42 east of Montgomery should be increased or decreased, the sub divisions will be correspondingly changed on a revenue basis.

The current rate on refined petroleum products, carloads, from Savannah, Ga. to Fort Benning Junction is 36 cents per 100 pounds. We are willing to divide this rate 66⅔% to the Seaboard and 33⅓% to the Page Railroad. Should this rate of 36 cents be increased or decreased,

these same percentages will apply in the division of the new rate."

Up to this time we have not made any commitments to Mr. Page as to other divisions.

Yours very truly, (Signed) C. R. Capps, Chief Traffic Officer.

Exhibit No. 10

Headquarters of the Infantry School

Office of the Quartermaster, Fort Benning, Georgia

September 19, 1919

Central of Georgia Railway Company, Savannah, Georgia.

Gentlemen:

Enclosed you will please find the revocation of the license heretofore granted you, upon the authority of the United States, under date of April 21, 1921, among other things authorizing you to use and operate standard gauge railway tracks and appurtenances, belonging to the United States constructed on the Fort Benning Military Reservation and standing from Fort Benning to Fort Benning Junction, Georgia.

Your attention is invited to the fact that the revocation of said license is made effective thirty days from the date of delivery of the enclosed revocation notice.

Very truly yours, (Signed) [illegible]
U. S. Quarterm[illegible]

Exhibit No. 11

Central of Georgia Railway Company, Savannah, Georgia.

Take Notice That:

A certain license granted to you on April 21, 1921, revocable at the will of the Secretary of War, to use and operate the standard gauge railway tracks and appurtenances, including the railroad bridge, belonging to the

United States, constructed on the Fort Benning Military Reservation and extending from Fort Benning to Fort Benning Junction, Georgia, and to build and maintain certain buildings of a temporary and removable type on said reservation, is hereby revoked effective thirty (30) days from the date of delivery of this notice to you, within which time you will remove your property from the premises and restore the property and premises of the United States in accordance with Condition 10 of said license.

Dated this 2nd day of September, 1932.

(Sgd.) F. H. Payne, The Assistant Secretary of War. (Seal.)

(Exhibits Nos. 12 to 15, inclusive, are omitted for the reasons hereinabove stipulated.)

Exhibit No. 16

No Supplement to this Tariff will be issued, except for the purpose of cancelling the Tariff.

G. F. O. Tariff No. 625. I. C. C. No. 2517.

R. C. G. No. 71)

(Reduction)

Central of Georgia Railway Company

Proportional Freight Tariff

Publishing Rates on Classes and Commodities

[fol. 323] Governed, except as otherwise provided herein, by Southern Classification No. 46, Agent E. H. Dulaney's I. C. C. No. 15, supplements thereto and reissues thereof, and by Exceptions shown in Note A (General Exceptions), and Note 94, of Exceptions No. 3 to Southern Classification, Agent E. H. Dulaney's I. C. C. No. 17, supplements thereto and reissues thereof.

Between Fort Benning Junction, Ga., and Central of Georgia Railway Company Stations, viz:

Fort Benning, Ga.

(Applicable only to Fort Benning, Ga., on traffic originating at points beyond Fort Benning Junction, Ga., and from Fort Benning, Ga., on traffic destined to points beyond Fort Benning Junction, Ga.)

Issued June 11, 1924. Effective June 15, 1924.

Issued on one (1) day's notice under authority of Rule 57, of I. C. C. Tariff Circular No. 18-A. Applies to or from point on newly constructed line to or from which no rates from same point of origin or to same point of destination has applied.

By F. D. McConnell,

General Freight Agent,

Savannah, Ga.

Station Tariff File No. 30. Authority No. 1820-T.

(600)

Mailing List No. 2430

G. F. O. Tariff No. 625

Item No. 1. Terminal, Transit and Other Privileges and Charges

In the absence of specific provisions to the contrary, shipments transported under this tariff will be subject to all [fol. 324] terminal charges and all allowances relating to:

Arbitraries,	Diversion,	Mileage on private cars,	Refrigeration,
Car rentals,	Drayage,	Overloaded cars, handling of,	Storage,
Car service,	Icing,	Reconsignment,	Switching,
Demurrage,	Inspection,		Transit privileges.

together with all other privileges, charges and rules, which in any way increase or decrease the amount to be paid on any shipment between points named in this tariff or as the same may be amended or changed, or which increase or decrease the value of the service to the shipper, as provided

in tariffs published and lawfully on file with the Interstate Commerce Commission.

In the absence of specific provisions in this tariff to the contrary, property destined to points beyond the tracks of the road named herein as issuing line, is entitled to such privileges and will be subject to such charges as provided in tariffs published and lawfully on file with the Interstate Commerce Commission of the carriers granting the privileges and performing the services.

The granting of the privileges and performance of the services described in this note shall be entirely upon the responsibility and at the cost of the carrier granting the privileges and performing the services, and without requiring the participation therein of any other carrier in the absence of authority therefor from such other carrier.

Item No. 2.

Application of Commodity Rates.

Whenever a carload (or less than carload) commodity rate is established it removes the application of the class rates to and from the same points on that commodity in carload quantities (or less than carload quantities) as the case may be.

The commodity rates on articles specified in this tariff are subject to the descriptions (including packing requirements) minimum weights (including graduated minima for cars of 36½ feet in length), estimated weights and all other rules of the Classification and Exceptions, if any, thereto, governing the class rates from and to the same points, unless otherwise provided.

(Here follows one photo, side folio 324½)

TABLE OF CLASS AND COMMODITY RATES - IN CENTS.

Between	PER ONE HUNDRED POUNDS										
* FORT BENNING JCT., GA.											
And	1	2	3	4	5	6	A	B	C	D	
CENTRAL OF GEORGIA RAILWAY COMPANY STATIONS.											
Fort Benning---Ga.	8	7	6	5	4	4	3	4	2	2	

Between	Cement, Natural or Portland, (Building Cement), C. L., per hundred pounds.	Coal and coke, C. L., per ton 2,000 pounds	Fertilizer and Fertilizer Material, C.L., per ton 2,000 pounds, as listed in Section 1 of Note 94 of Agent E.H.Dulaney's Exceptions No.3 to Southern Classification, I.C.C.No. 17, supplements thereto and reissues thereof.	Ice, C. L. per hundred pounds.	Lime, C. L., per hundred pounds.	Lumber, C. L., per hundred pounds.	Sand and Gravel, CL, minimum weight 90 per cent of marked capacity of car, except when cars are loaded to their visible capacity actual weight will govern, per ton 2,000 pounds
*FORT BENNING JUT., GA.							
And							
CENTRAL OF GEORGIA RAILWAY COMPANY STATIONS.							
Fort Benning---Ga.	2	30	40	4	2	2½	30

*-Applicable only to Fort Benning, Ga., on traffic originating at points beyond Fort Benning Junction, Ga., and from Fort Benning, Ga., on traffic destined to points beyond Fort Benning Junction, Ga.

[fol. 325] EXHIBIT No. 17

No supplement to this tariff will be issued except for the purpose of canceling the tariff.

G. F. O. Tariff No. 627. I. C. C. No. 2518.

(Reduction)

Central of Georgia Railway Company

Local Freight Tariff

Publishing Rates on Coal and Coke, Carloads

Governed, except as otherwise provided herein, by Southern Classification No. 46, Agent E. H. Dulaney's I. C. C. No. 15, supplements thereto and reissues thereof, and by [fol. 326] Exceptions shown in Note A (General Exceptions) of Exceptions No. 3 to Southern Classification, Agent E. H. Dulaney's I. C. C. No. 17, supplements thereto and reissues thereof.

From Central of Georgia Railway Company

Alabama Mines, Named Herein, to Fort Benning, Georgia

Issued June 11, 1924 Effective June 15, 1924.

Issued on one (1) day's notice under authority of Rule 57, of I. C. C. Tariff Circular No. 18-A. Applies to or from point on newly constructed line to or from which no rates from same point of origin or to same point of destination has applied.

By F. D. McConnell, General Freight Agent, Savannah, Georgia

Station Tariff File No. 17. Authority No. 22-Ta. (216).

(200)

(File with Coal Tariff.) Mailing List No. 2432

Made in U. S. A.

Item No. 1—Terminal, Transit and Other Privileges and Charges

In the absence of specific provisions to the contrary, shipments transported under this tariff will be subject to all terminal charges and all allowances relating to:

Arbitraries,	Diversion,	Overloaded cars, handling of,	Switching,
Car rentals,	Drayage,	Reconsignment,	Transit privileges,
Car Service,	Inspection,	Storage,	
Demurrage,	Mileage on private cars,		

together with all other privileges, charges, and rules which in any way increase or decrease the amount to be paid on any shipment between points named in this tariff or as the same may be amended or changed, or which increase or decrease the value of the service to the shipper, as provided in tariffs published and lawfully on file with the Interstate Commerce Commission.

Item No. 2—Minimum Carload Weight

The minimum carload weight is as follows:

[fol. 327] Cars must, in all cases, be loaded to their visible capacity and when this is done the charge will be for actual weight, except that on washed coal deduction for moisture as authorized in Item No. 3 will be made. Cars not loaded to their visible capacity will be charged for at the stenciled capacity.

The stenciled capacity must be used when it is impracticable to ascertain the scale weight.

Item No. 3—Deductions for Moisture on Washed Coal

On shipments of washed coal the following deductions for moisture will be made from the actual weight ascertained on track scales.

When originating at Acmar, Margaret, New Acton, Ala., washed and weighed at Colgate, Ala., 7½%.

When originating at Overton No. 1 or Overton No. 2, Ala., and weighed at Overton, Ala., 2½%.

No deduction will be made if weighed enroute (other than as authorized above) or if weighed more than twenty-four hours after the coal is washed.

Agents at billing points will show the gross, tare and net weights and deductions for moisture (if any) on face of waybills.

Item No. 4—Washing Coal in Transit at Colgate, Ala.

The through rates on coal published in tariff and as may be amended, will include the stopping in transit of shipments at Colgate, Ala., (when from Acmar, Grants, Margaret, New Acton, Overton No. 1 or Overton No. 2, Ala.), for the purpose of washing the coal.

Coal and Coke, Carloads

Rates are in Cents per Ton of 2,000 Pounds

From	To	Rate
Centra. of Georgia Railway Company Alabama Mines, viz.		
Acmar....Ala..		
Birmingham....Ala..		
Carbo....Ala..		
Grants....Ala..		
Lens....Ala..	Fort Benning....Ga.	289
Margaret....Ala..		
New Acton....Ala..		
Overton No. 1....Ala..		
Overton No. 2....Ala..		

[fol. 328] EXHIBIT No. 18

No supplement to this tariff will be issued, except for the purpose of cancelling the tariff.

G. F. O. Tariff No. 625-A. I. C. C. No. 2528.

R. C. G. No. 71

Cancels G. F. O. Tariff No. 625. Cancels I. C. C. No. 2517

Central of Georgia Railway Company

Proportional Freight Tariff

Publishing Rates on Classes and Commodities

Governed, except as otherwise provided herein, by Southern Classification No. 46, Agent E. H. Dulaney's I. C. C. No. 15, supplements thereto and reissues thereof, and by Exceptions shown in Note A (General Exceptions), and Note 94, of Exceptions No. 3 to Southern Classification, Agent E. H. Dulaney's I. C. C. No. 17, supplements thereto and reissues thereof.

Between Fort Benning Junction, Ga. and Central of Georgia Railway Company Stations, Viz:
Fort Benning, Ga.

(Applicable only to Fort Benning, Ga., on traffic originating at points beyond Fort Benning Junction, Ga., and from Fort Benning, Ga., on traffic destined to points beyond Fort Benning Junction, Ga.)

Issued August 29, 1924. Effective October 8, 1924.

(Except as Noted in Individual Items)

By F. D. McConnell, General Freight Agent,
Savannah, Ga.

Station Tariff File No. 30. Authority No. 1820-Tb.

(600)

Mailing List No. 2430

G. F. O. Tariff No. 625-A

Item No. 1. Terminal, Transit and Other Privileges and Charges

In the absence of specific provisions to the contrary, shipments transported under this tariff will be subject to all [fol. 329] terminal charges and all allowances relating to:

Arbitraries,	Diversion,	Mileage on private cars,	Refrigeration,
Car rentals,	Drayage,	Overloaded cars, handling of,	Storage,
Car service,	Icing,	Reconsignment,	Switching,
Demurrage,	Inspection,		Transit privileges.

together with all other privileges, charges and rules, which in any way increase or decrease the amount to be paid on any shipment between points named in this tariff or as the same may be amended or changed, or which increase or decrease the value of the service to the shipper, as provided in tariffs published and lawfully on file with the Interstate Commerce Commission.

In the absence of specific provisions in this tariff to the contrary, property destined to points beyond the tracks of the road named herein as issuing line, is entitled to such privileges and will be subject to such charges as provided in tariffs published and lawfully on file with the Interstate Commerce Commission of the carriers granting the privileges and performing the services.

The granting of the privileges and performance of the services described in this note shall be entirely upon the responsibility and at the cost of the carrier granting the privileges and performing the services, and without requiring the participation therein of any other carrier in the absence of authority therefor from such other carrier.

Item No. 2. Application of Commodity Rates

Whenever a carload (or less than carload) commodity rate is established it removes the application of the class rates to and from the same points on that commodity in carload quantities (or less than carload quantities) as the case may be.

The commodity rates on articles specified in this tariff are subject to the descriptions (including packing requirements) minimum weights (including graduated minima for cars of 36½ feet in length), estimated weights and all other rules of the Classification and Exceptions, if any, thereto, governing the class rates from and to the same points, unless otherwise provided.

Table of Class Rates—in Cents

Between	Per One Hundred Pounds									
††Fort Benning Jct., Ga.	1	2	3	4	5	6	A	B	C	D
And Central of Georgia Railway Company Stations Fort Benning, Ga.	8	7	6	5	4	4	3	4	2	2

[fol. 330]

Between

‡ Fort Benning Jct., Ga.

And

Central of Georgia Railway Company Stations

Fort Benning, Ga.

Rates Are In Cents Per One Hundred Pounds, Except as Shown

Commodity	Rate
Beverages, viz: Description (a): Beverages, alcoholic (non-intoxicating), viz: Ale, beer, beer tonics or porter, in pack-	X†3

X—Reduction.

†—Effective September 6, 1924. Issued on five (5) days' notice under Special Permission of the Interstate Commerce Commission No. 68815, of August 23, 1924, as amended August 27, 1924.

‡—Applicable only to Fort Benning, Ga., on traffic originating at points beyond Fort Benning Junction, Ga., and from Fort Benning, Ga., on traffic destined to points beyond Fort Benning Junction, Ga.

Rates Are In Cents Per One Hundred Pounds, Except as Shown—Continued

Commodity	Rate
ages provided for straight car load shipments in Southern Classification, straight or mixed carloads, minimum weight 20,000 lbs.	
Description (b):	
Beverages (non-intoxicating), carbonated, flavored or phosphated (beverages, non-intoxicating, such as cereal beverages, ginger ale, birch beer, root beer or sarsaparilla), except as specifically published in individual items in rate tables, not including extracts or syrups in packages provided for straight carload shipments in Southern Classification, straight or mixed carloads, minimum weight 30,000 lbs.	
Description (c):	X†3
Waters, mineral or plain, not flavored or phosphated, carbonated (charged) and other than carbonated, in packages provided for straight carload shipments in Southern Classification, straight or mixed carloads, minimum weight 30,000 libs.	
In carloads consisting of	
Any or all of the articles specified in Description (a) mixed with	
Any or all of the articles specified in Descriptions (b) and (c).	
Or consisting of	
Any or all of the articles specified in De- [fol. 331] scription (b), mixed with	
Any or all of the articles specified in Description (c), minimum weight 30,000 lbs.	

X—Reduction.

†—Effective September 6, 1924. Issued on five (5) days' notice under Special Permission of the Interstate Commerce Commission No. 68815, of August 23, 1924, as amended August 27, 1924.

Rates Are In Cents Per One Hundred Pounds, Except as Shown—Continued

Commodity	Rate
Canned Goods, straight or mixed carloads:	
Group 1. Fruits and Vegetables—Canned or preserved, etc.:	
Cocoanut, prepared, other than desiccated, in metal cans, in boxes.	
Fruits, other than dried, evaporated, or fresh, canned or preserved in juice or syrup or in liquid other than brine or alcoholic liquor, fruit butter, crushed fruit, fruit jam, fruit jelly, or fruit pulp;	
Jams, jellies, or preserves (other than fruit), edible;	
Vegetables: Canned or preserved, including canned corn, canned hominy, canned pork and beans, canned scrapple, canned tomatoes, or canned wheat, but not including dried or evaporated vegetables.	
Pimentos, in metal cans;	X†3
Pudding;	
Tomato pulp;	
Peanut paste (peanut butter);	
in packages as provided for in Southern Classification; in straight or mixed carloads, minimum weight 36,000 lbs.	
Group 2. Sauces and Condiments—Tables, etc.	
Sauces and Condiments, Table viz.	
Catsup; Table sauces;	
Horseradish, prepared; Olives, pimentos, pickled in brine or	
Mustard, prepared; vinegar;	
Pepper sauce; Pickles;	
Salad dressing; Sauerkraut;	

X—Reduction.

†—Effective September 6, 1924. Issued on five (5) days' notice under Special Permission of the Interstate Commerce Commission No. 68815, of August 23, 1924, as amended August 27, 1924.

Rates Are In Cents Per One Hundred Pounds, Except as Shown—Continued

Commodity	Rate
[fol. 332] in packages as provided for in Southern Classification, in straight or mixed carloads; or in mixed carloads with cider and vinegar, carload, minimum weight 36,000 lbs.	X‡3

G. F. O. Tariff No. 625-A

Between

‡ Fort Benning Jct., Ga.

And

Central of Georgia Railway Company Stations

Fort Benning, Ga.

Rates Are In Cents Per One Hundred Pounds, Except As Shown

Commodity	Rate
Canned Goods, straight or mixed carloads—(cont'd.)	
Group 3. Meats cooked, cured, or preserved:	
Meats, cooked, cured or preserved;	
Meats, cooked, cured or preserved, with vegetable ingredients;	
Mincemeat;	X‡3
in glass earthenware or metal cans, packed as provided for in Southern Classification; in straight or mixed carloads, minimum weight 36,000 lbs.	
Group 4. Fish—Shell and other than shell, cooked pickled or preserved;	

X—Reduction.

‡—Effective September 6, 1924. Issued on five (5) days' notice under Special Permission of the Interstate Commerce Commission No. 68815, of August 23, 1924, as amended August 27, 1924.

‡—Applicable only to Fort Benning, Ga., on traffic originating at points beyond Fort Benning Junction, Ga., and from Fort Benning, Ga., on traffic destined to points beyond Fort Benning Junction, Ga.

Rates Are In Cents Per One Hundred Pounds, Except as Shown—Continued

Commodity	Rate
Fish, shell and other than shell, cooked pickled or preserved;	
Fish, combined with vegetables, canned (fish, cake or fish balls);	
in packages as provided for in Southern Hot 33[illegible] Classification; in straight or mixed carloads; minimum weight 36,000 lbs	
Group 5 Soups, including broths or chowders:	
Soups, including broths or chowders:	
in packages as provided for in Southern Classification; in straight or mixed carloads, minimum weight 36,000 lbs	
Group 6 Milk or cream, condensed or evaporated liquid:	X13
Milk or cream, condensed or evaporated, liquid,	
Milk, condensed or evaporated, containing vegetable fats or chocolate and malt, in metal cans;	
Milk, powdered or flaked (see Note);	
Note: Not applicable on powdered or flaked milk in glass or earthenware.	
in packages as provided for in Southern Classification; in straight or mixed carloads; minimum weight, 36,000 lbs.	
Group 7 Macaroni, spaghetti or vermicelli:	
Macaroni, spaghetti, or vermicelli, prepared with or without cheese, meat or vegetables;	
in packages as provided for in Southern Classification; in straight or mixed carloads; minimum weight 36,000 lbs.	

X—Reduction.

—Effective September 6, 1924. Issued on five (5) days' notice under Special Permission of the Interstate Commerce Commission No. 68815, of August 23, 1924, as amended August 27, 1924.

Rates Are In Cents Per One Hundred Pounds, Except as Shown Continued

Commodity	Rate
Group 8.	
One or more articles named in any group with one or more articles named in any other group or groups, in mixed carloads, or in mixed carloads *or in mixed carloads* with cider and vinegar; weight 36,000 lbs.	
Group 9.	
One or more articles named in Groups 1 to 8, inclusive, in mixed carloads with molasses, N O I B N, in Southern Classification, and syrups, not medicated, N O I B N, in Southern Classification, in packages as [fol. 334] provided in Southern Classification, minimum weight 36,000 lbs.	X*2
Group 10	
Cider and vinegar, in packages straight or mixed carloads and in tank cars, subject to tank car rules.	
Cement, Natural or Portland Building Cement) C. L.	2
Coal and Coke, C. L., per ton 2,000 pounds	30
Emigrant Movables rated Fifth Class in carloads in Southern Classification, C. L.	X*2
Fertilizer and Fertilizer Material, C. L., per ton 2,000 lbs., as listed in section 1 of Note 94 of Agent E. H. Dulaney's Exceptions No. 3 to Southern Classification, I. C. C. No. 17, supplements thereto and reissues thereof.	40

X—Reduction.

*—Effective September 6, 1924. Issued on five (5) days' notice under Special Permission of the Interstate Commerce Commission No. 68815, of August 23, 1924, as amended August 27, 1924.

Rates Are In Cents Per One Hundred Pounds, Except as Shown—Continued

Fruits and vegetables, fresh or green, viz:

Apples,
Beets, without tops,
Cabbage,
Carrots, without tops,
Onions, without tops,
Parsnips, without tops,
Potatoes,
Turnips, without tops,

Commodity	Rate
Straight of mixed, C. L.	X†3
Household Goods, as described in Southern Classification, C. L.	X†4
Ice, C. L.	4
Iron and Steel Articles, rated "Special Iron" in carload in Southern Classification, in straight or mixed carloads, loose or in packages as provided for carload shipments in Southern Classification, minimum weight as provided in Southern Classification (see Note.)	X†3
NOTE.—On mixed carloads, the highest minimum carload weight on any article contained in the shipment will apply.	
Lime, C. L.	2
Lumber, C. L.	2½
Meats, Fresh, all kinds (including dressed poultry), carload minimum weight 20,000 lbs.	X†4
[fol. 335] Molasses and Syrup (except coloring, flavoring, fruit or medicated syrups); Molasses, Beet, Cane or sorghum, in packages provided in Southern Classification, straight or mixed carload minimum weight 36,000 lbs., in tank cars, minimum weight 50,000 lbs.	X†3
Petroleum and Petroleum Products, rated 5th class carload in Southern Classification; in packages provided for carload shipments in Southern Classification, or in tank cars, C. L.	X†3
Rice, cleaned, in bags, barrels or boxes, C. L., minimum weight 30,000 lbs. (see Note.)	X†3

X—Reduction.

†—Effective September 6, 1924. Issued on five (5) days' notice under Special Permission of the Interstate Commerce Commission No. 68815, of August 23, 1924, as amended August 27, 1924.

Rates Are In Cents Per One Hundred Pounds, Except as Shown—Continued

Commodity	Rate
NOTE.—On shipments in single or double sacks (or pockets), single sacks (or pockets) to be of not less than 12 ounces burlap, machine sewed or double hand sewed.	
Salt, Common (sodium chloride), in packages or in bulk, C. L., minimum weight 40,000 lbs.	X†2
Sand and gravel, C. L., minimum weight 90 per cent of marked capacity of car, except when cars are loaded to their visible capacity actual weight will govern, per ton 2,000 lbs.	30
Stoves and Ranges, viz: Stoves and ranges (not including alcohol, electric, gas, gasoline, oil or vapor stoves or ranges); Stove hollowware and other stove furniture (not tinware or enameled ware); Stove parts, cast or sheet iron or steel; Stove plates; Stove boards; Stove pipe, side seams not closed; Straight or mixed carload, minimum weight 20,000 pounds (see Note).	X†3
NOTE.—Stoves or ranges, not crated or boxed, must be so braced in the car as to prevent shifting of the load and to insure safe transportation.	
[fol. 336] Sugar, beet or can, in cartons or bags in barrels or boxes, in double bags, in bulk in barrels, or in single bags of the description provided in Southern Classification, minimum weight 30,000 pounds	X†3

X—Reduction.

†—Effective September 6, 1924. Issued on five (5) days' notice under Special Permission of the Interstate Commerce Commission No. 68815, of August 23, 1924, as amended August 27, 1924.

Rates Are In Cents Per One Hundred Pounds, Except as Shown Continued

Commodity	Rate
Vehicles, Motor: Automobiles, freight, as described in Southern Classification, C. L.	X45
Vehicle, Motor: Automobiles, passenger, as described in Southern Classification, C. L.	X45

Exhibit No. 19

No supplement to this tariff will be issued except for the purpose of cancelling the tariff.

G. F. O. Tariff No. 627-A. I. C. C. No. 2527.

Cancels G. F. O. Tariff No. 627. Cancels I. C. C. No. 251

Central of Georgia Railway Company

Local Freight Tariff

Publishing Rates on Coal and Coke, Carloads

Governed, except as otherwise provided herein, by Southern Classification No. 46, Agent E. H. Dulaney's—I. C. C. No. 15, supplements thereto and reissues thereof, and by Exceptions shown in Note A (General Exceptions) of Exceptions No. 3 to Southern Classification, Agent E. H. Dulaney's I. C. C. No. 17, supplements thereto and reissues [fol. 337] thereof.

X—Reduction.

+—Effective September 6, 1924. Issued on five (5) days' notice under Special Permission of the Interstate Commerce Commission No. 68815, of August 23, 1924, as amended August 27, 1924.

From Central of Georgia Railway Company

Alabama Mines, Named Herein,

to

Fort Benning, Georgia

Issued August 28, 1924. Effective September 6, 1924.

Issued on five (5) days' notice under Special Permission of the Interstate Commerce Commission No. 68815, of August 23rd, 1924.

By F. D. McConnell,

General Freight Agent

Savannah, Georgia

Station Tariff File No. 17. Authority No. 22-Th. (418).

(200)

(File with Coal Tariff.) Mailing List No. 2432

Made in U. S. A.

Item No. 1 Terminal, Transit and Other Privileges and Charges

In the absence of specific provisions to the contrary, shipments transported under this tariff will be subject to all terminal charges and all allowances relating to:

Coal and Coke, Carloads

Rates are in Cents per Ton of 2,000 Pounds

From	To	Rate
Central of Georgia Railway Company Alabama Mines, viz: Acmar Ala., Birmingham Ala., Carbo Ala., Grants Ala., Lens Ala., Margaret Ala., New Acton Ala., Overton No. 1 Ala., Overton No. 2 Ala.	Fort Benning Ga.	x265

x—Reduction.

together with all other privileges, charges, and rules which in any way increase or decrease the amount to be paid on any shipment between points named in this tariff or as the same may be amended or changed, or which increase or

decrease the value of the service to the shipper, as provided in tariffs published and lawfully on file with the Interstate Commerce Commission.

Item No. 2 Minimum Carload Weight

The carload minimum weight is as follows:

Cars must, in all cases, be loaded to their visible capacity and when this is done the charge will be for actual weight, except that on washed coal deductions for moisture as authorized in Item No. 3 will be made. Cars not loaded to their visible capacity will be charged for at the stenciled capacity.

The stenciled capacity must be used when it is impracticable to ascertain the scale weight.

[fol. 338] Item No. 3 Deductions for Moisture on Washed Coal

On shipments of washed coal the following deductions for moisture will be made from the actual weight ascertained on track scales.

When originating at Acmar, Margaret, New Acton, Ala., washed and weighed at Colgate, Ala., 7½%.

When originating at Overton No. 1 or Overton No. 2, Ala., and weighed at Overton, Ala., 2½%.

No deduction will be made if weighed enroute (other than as authorized above) or if weighed more than twenty-four hours after the coal is washed.

Agents at billing points will show the gross, tare and net weights and deductions for moisture (if any) on face of waybills.

Item No. 4 Washing Coal in Transit at Colgate, Ala.

The through rates on coal published in tariff and as may be amended, will include the stopping in transit of shipments at Colgate, Ala., (when from Acmar, Grants, Margaret, New Acton, Overton No. 1 or Overton No. 2, Ala.), for the purpose of washing the coal.

Arbitraries,
Car rentals,
Car service,
Demurrage,
Diversion,
Drayage,
Inspection,
Mileage on private cars,
Overloaded cars, handling of
Reconsignment,
Storage,
Switching,
Transit privileges,

Exhibit No. 20

United States Government

Federal Traffic Board

551.2 Ft. Benning, Ga.

Washington, September 5, 1924.

Mr. N. B. Wright, Assistant Freight Traffic Manager, Central of Georgia Railway, Savannah, Ga.

Dear Sir:

Subject: Rates to and from Fort Benning, Ga.

[fol. 339] I beg to acknowledge and thank you for your letter of September 2nd, file 52850-52 C. The tariffs were received and it is our understanding that the reduced rates will be applied upon all the Government's traffic handled since June 15, 1924. This is in accordance with your letter of August 18th, file 52850 52 C.

With reference to your other letter of the same date, regarding routing between Fort Benning, Ga. and New York and Boston, the revised routing suggested by you was furnished to the office of the Quartermaster General with request that same be substituted for the other routing furnished and the routing divisions of this office have been requested to observe this routing on traffic routed by this office.

Permit us to express our sincere appreciation of the conciliatory and friendly spirit displayed by your line in the adjustment of our complaint.

Yours very truly, Coordinator for Traffic, by (Sd.) W. H. Quigg, Chief, Rate and Classification Division.

EXHIBIT No. 21

Seaboard Air Line Railway

Norfolk, Va., Sept. 26, 1932.a—A.

Personal & Confidential

Mr. W. McN. Knapp, T. M., Central of Georgia Railway, Savannah, Ga.

DEAR MR. KNAPP:

Referring to my letter of September 25th and to our conversation regarding divisions in connection with the Fort Benning Railroad. After I talked with you Mr. Page, Sr. saw me and said that the gasoline for Fort Benning was moving from Baton Rouge and not from Savannah. He wanted to know what they could count on in the matter of divisions from Baton Rouge via Montgomery. I told him that I could not give him any advice as to that matter at the time, but that I would look into it.

According to our records here, the rate on gasoline from Baton Rouge to Fort Benning Junction is 43 cents, pro- [fol. 340] portion east of Montgomery 38 cents or 16.3 cents per 100 pounds. I am disposed to allow the Fort Benning Railroad 33⅓% of the proportion east of Montgomery. Kindly advise promptly if this is agreeable to you.

As to Southern Railway trackage, from my conversation with Mr. Page, Sr. I am quite sure this matter has never occurred to them.

Yours very truly, (Sd.- C. R. Capps, Chief Traffic Officer.

EXHIBIT No. 22

Headquarters, The Infantry School

Office of the Quartermaster, Fort Benning, Georgia

July 11, 1932.

Subject: Operation of the Fort Benning railroad

To The Commandant, The Infantry School, Fort Benning, Ga.:

1. There is forwarded herewith a proposal of Messrs. H. A. Page, Jr., and C. F. Harris, joint owners and operators of the Cape Fear Railways, Inc., located within the Government reservation at Fort Bragg, N. C., for the operation, under lease, of the Government-owned railroad from Fort Benning Junction, Ga., to Fort Benning, Ga., including maintenance of tracks and switches, as a substitute for the revokable license now held by the Central of Georgia Railway Company (Incl. #1).

2. This office has given this matter careful study and consideration, and although the service furnished at present by the Central of Georgia Railway is to a degree satisfactory, in conformity with the economic policy of the War Department it is believed that the earnest consideration of this proposal by the War Department should be solicited as it is believed that a meterial saving of Government funds could be effected by the revocation of the license now held by the Central of Georgia Railway and by the acceptance of the proposal of Messrs. Page and Harris.

3. It is believed that Fort Benning should enjoy the same freight rates as apply to Columbus, Ga., or Fort Benning Junction, Ga. Since the license with the Central of Georgia Railway Company became effective higher rates have been put in effect through the establishment of arbitraries [fol. 341] of from 8¢ to 2¢ per c.w.t. on all classes and commodities of freight, applicable on traffic originating at points beyond Fort Benning Junction, Ga., and from Fort Benning, Ga., on traffic destined to points beyond Fort Benning Junction. Following is a compilation approximating, as near as can be determined from records on file in this office, the cost to the Government on account of these arbitraries during the fiscal year 1932:

a. Inbound Carload Shipments (Government)

40 cars	Iron Pipe	weight	2,220,000 lbs., freight	$ 600.00
144	Cement		12,927,000	2905.58
10	Beans		940,000	199.00
30	Household Goods		100,000	102.10
400	Hay & Straw		7,600,000	1552.00
15	Coal		750,000	225.00
38	Canned Goods		900,000	209.00
56	Misc. GM Stores		2,840,000	1321.00
10	Beef		950,000	175.00
35	Flour		1,200,000	240.00
11	Sugar		600,000	109.00
10	Misc. Subsistence		2,230,000	691.00
5	Desk & Tile		1,020,000	102.00
245	Coal & Coke		25,000,000	1050.00
31	Lumber		2,340,000	519.00
10	Coal Stores		840,000	172.00
17	Bldg. Materials		2,230,000	940.00
141	Pet. Products		6,511,200	1052.00
10	Oats		1,080,000	216.00
60	Sand & Gravel		6,200,000	930.00
3	Ice		60,000	30.00
1,015			91,192,100	$15187.94

b. Outbound Carload Shipments (Government)

40 cars	Household Goods	weight	709,230 lbs., freight	301.22
2	Coal Stores		319,100	171.48
1	Wagons, etc.		12,100	22.00
1	Road Machinery		13,300	7.80
6	Live Stock		173,000	41.60
71			1,149,830	$546.60

Inbound Less Than Carload Shipments (Government)
1,429,214 lbs., based on average arbitrary, approximately $857.52

d. Outbound Less Than Carload Shipments (Government)
615,076 lbs., based on average arbitrary, approximately $430.55

e. Inbound Carload Shipments (Post Exchange)
970 cars Gasoline, Weight 3,234,000 lbs., Freight $970.20

f. Other Inbound Shipments (Post Exchange)
Approximately 720,000 lbs., based on average arbitrary $330.00

g. Inbound Carload Shipments (Civilian Contractors)
Approximately 300 cars miscellaneous building materials, weight approximately 9,000,000 lbs., estimated freight $3000.00

(Col. 342)

Recapitulation

1,015 Inbound Carloads (Government),	weight	91,488,100#, freight	$15187.94
71 Outbound	"	1,149,830#, "	546.60
Inbound L.C.L.	"	1,429,214#, "	857.52
Outbound L.C.L.	"	615,076#, "	430.55
970 Inbound Carloads (Post Exchange)	"	3,234,000#, "	970.20
Inbound L.C.L. (Post Exchange)	"	720,000#, "	330.00
300 Inbound Carloads (Contractors)	"	9,000,000#, "	3000.00
		Total Cost	$21342.81

The estimated freight charges shown herein are very conservative, and in the compilation of these figures particular care has been exercised to avoid the inclusion of commodities and materials which would not normally be received at or shipped from this station. These figures are temporarily inflated due to construction work going on, but they do not include the impedimenta accompanying the recent movement of the Tank School to this station, nor shipments rejected and returned to carrier, nor less than carload shipments received and forwarded on commercial bills of lading, of which a complete record is not available.

4. At present there is being operated at this station for necessary switching, one standard engine locomotive at a monthly cost approximating the following:

1 Engineer (civilian)	$ 177.60
45 tons coal @ $13.96 per ton	628.20
12½ gallons Engine Oil @ 14¢ per gallon	1.75
12½ gallons Steam Cylinder Oil @ 10¢ per gallon	1.25
Light running repairs, estimated	65.00
Total	$ 873.80

No enlisted crew, consisting of one fireman, one engineer, switchman, and one conductor is assigned to this service. Considering the additional cost to the Government on account of the arbitraries to and from Fort Benning Junction, and cost of operating one locomotive for necessary switching, but not considering cost of maintenance of any part of the Government trackage not at present being maintained by the Central of Georgia Railway Company, or any cost incident to the employment of an enlisted crew for locomotive, the average monthly cost to the Government, for freight service at this station during the fiscal year 1932, is estimated to have been $2,676.32.

5. In view of the above figures, and the clear evidence that a material saving of Government funds may be effected thereby, it is recommended that the revokable license now held by the Central of Georgia Railway Company for the operation of the Government-owned railroad from Fort Benning, Ga., to Fort Benning Junction, Ga., be revoked and that the proposal of Messrs. Page and Harris be accepted for a limited period during which a careful re-

ord will be kept for comparison of the cost of operation under lease now in effect with the Central of Georgia Railway and Cost of operation of this line under such lease as may be granted the proponents. A careful study has been made of the records in connection with the operation of the Cape Fear Railways, Inc., at Fort Bragg, N. C., and it is believed that a lease similar to that in effect at Fort Bragg would be to the material advantage of the Government at this station.

6. In this connection, it may be recalled that on February 10, 1932 this office recommended that the license now held by the Central of Georgia Railway Company be revoked due to the fact that the service being furnished by that line at that time was entirely unsatisfactory to this office. It is a well known fact that where competition among common carriers is eliminated the carrier enjoying exclusive rights within a limited territory is prone to become indifferent with regard to service, and it is believed that with the reestablishment of competition between the Central of Georgia and Seaboard Air Line railways at Fort Benning Junction it is reasonable to assume that Government freight will receive more prompt attention.

7. In connection with the proposal of Messrs. Page and Harris, they submit lists showing the traffic handled into Fort Benning during the calendar year 1931 (Incl. #2), also their compilation of shipments received at Fort Benning during the fiscal year 1932 (Incl. #3). The latter list is somewhat at variance with figures shown herein, in explanation of which it may be stated that our figures include the actual weights of less-than-carload shipments received and forwarded, except commercial L. C. L. shipments, whereas their list appears to presuppose that most of the cars received and forwarded were loaded to the prescribed minimum. It may not be amiss to mention that the so-called "trap-car system" is in use at this station for the handling of less-than-carload lots. These cars are seldom loaded to capacity.

8. There is also forwarded herewith a file of correspondence and other documents (Incl. #4) having reference to operation of the Government-owned railroad at Fort Bragg, N. C., together with copy of 6th indorsement, Hqrs. 4th

Corps Area, March 25, 1931 (Incl. #5), and copy of letter [fol. 344] from Brigadier General A. J. Bowley to Major General Frank R. McCoy, then commanding the Fourth Corps Area, dated December 18, 1929 (Incl. #6), and copy of Central of Georgia proportional freight tariff G. F. O. No. 625-I, I. C. C. No. 2790, showing the arbitraries referred to above (Incl. #7).

9. It is realized that a change such as is recommended herein would result in dispensing with the services of the civilian locomotive engineer now employed at this station. It is the desire of this office that in the event this recommendation receives favorable consideration and a lease is granted to Messrs. Page and Harris some provision be made for the utilization of his services by the contracting parties. Mr. Harris has stated, verbally, that they may be in position to place one or more of the civilian mechanics who were separated from the Rail Transportation shops June 30, 1932.

(Signed) J. DeCamp Hall, Colonel, Quartermaster Corps, Quartermaster.

617 (7/11/32).

1st Ind.

Headquarters the Infantry School, Office of the Commandant, Fort Benning, Georgia, July 18, 1932.—To The Quartermaster General, Washington, D. C.

1. The economy of operation, with resulting savings presented, and the independence of action offered government authorities through a properly drawn license, would make the attached proposal appear as a possible and desirable solution to the problem at this station.

2. It is recommended that the subject be given consideration in connection with our recent requests with reference to the present arrangement with the Central of Georgia.

Campbell King, Major General, Commandant.

7 Incls.

OFFER IN EVIDENCE

8. The Defendant, H. D. Pollard, as Receiver of Central of Georgia Railway Company, introduced in evidence an extract from the Order of the District Court of the United States for the Eastern District of Virginia, appointing Receivers of the Seaboard Air Line Railway, dated December 23, 1930, the said extract being as follows:

"(3). Said receivers are authorized and empowered to institute and prosecute, within this Judicial District or elsewhere, in any court or before any officer, department, com- [fol. 345] mission or other tribunal, and in their own names as receivers or in the name of the Railway Company as they may be advised by counsel, all such actions, proceedings, or suits as in their judgment may be necessary for the recovery or proper protection of said property, or any part thereof, and the discharge of their trust, and likewise to appear in and defend any and all actions, proceedings or suits which may be instituted and prosecuted against them as receivers in or before any such tribunal."

STIPULATION

We hereby stipulate and agree that the foregoing "Statement of Evidence and Proceedings before the Court" in the case of Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, Plaintiffs, v. United States of America, et al., Defendants, in Equity No. 325, is correct, and we further agree to all of the stipulations contained in said statement of evidence and proceedings before the Court.

This 3rd day of July, 1936.

W. R. C. Cocke, Chas. T. Abeles, Solicitors for Plaintiffs. Elmer B. Collins, Special Assistant to the Attorney General for the United States. Edward M. Reidy, Attorney for the Interstate Commerce Commission. T. M. Cunningham, Solicitor for H. D. Pollard as Receiver of Central of Georgia Railway.

[fol. 346] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING STATEMENT OF EVIDENCE AND PROCEEDINGS BEFORE THE COURT—Filed July 7, 1936

The foregoing "Statement of Evidence and Proceedings before the Court" in the case of Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, Plaintiffs, v. United States of America, et al., Defendants, in Equity No. 325, is hereby approved, ordered filed, and the same, together with the Stipulation of Counsel, is made a part of the record for the purposes of the appeal of said Cause.

This 6th day of July, 1936.

W. H. Barrett, United States District Judge.

Filed in office, Savannah Division, July 7, 1936.

[File endorsement omitted.]

[fol. 347] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA

In Equity. No. 325

LEGH R. POWELL, JR., and HENRY W. ANDERSON, Receivers of Seaboard Air Line Railway, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Defendant

H. D. POLLARD, Receiver of Central of Georgia Railway Company, Intervenor

Before Samuel H. Sibley, United States Circuit Judge; Bascom S. Deaver, United States District Judge; Wm. H. Barrett, United States District Judge

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAWS—Filed June 3, 1935

This is a proceeding before a statutory court organized under 28 U. S. C. A. Section 47, to set aside an order of the

Interstate Commerce Commission by authority of 28 U. S. C. A., Section 41 (28).

The order of the Commission is as follows:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and said Commission in said report having found the provision of the Seaboard Air Line Railway Company schedules, I. C. C. No. A-6826, Sixth Revised page 139, effective December 4, 1933, that 'Fort Benning Junction, Ga., switching limits include the receiving and delivery tracks at Fort Benning Military Post' to be unlawful:

It is ordered, That Sixth Revised Page 139 of said schedules, be and it is hereby, stricken from the files of this Commission."

The schedule ordered stricken from the files reads:

"Switching at Fort Benning Junction, Ga.

Reciprocal Switching

Fort Benning Junction, Ga., switching limits will include the receiving and delivery tracks at the Fort Benning Military Post."

[fol. 348] Jurisdiction

The United States challenges the jurisdiction of this Court in this cause because (a) the action of the Commission in ordering the Seaboard tariff "stricken from its files is an accomplished fact and that the only remedy is by mandamus, (b) such order is negative in that it does not direct the Seaboard to do or not to do anything and that such an order is not reviewable under the act and (c) there is an adequate remedy at law.

If the objection that the order is not reviewable because the act complained of is an accomplished fact and cannot be enjoined be well founded no order of the Commission cancelling a tariff could be ever attacked. It should be remembered that this court has power not only to "enjoin"

but also to "set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The prayer is not only to enjoin but that such order "be set aside and forever annulled."

It is urged that because the order does not order the Seaboard to do anything it is negative and is not reviewable. Cases are cited holding that orders negative in form and substance are not reviewable, but where negative in form but have an affirmative effect they are reviewable. United States v. New River Co., 265 U. S. 533; Alton R. R. v. United States, 287 U. S. 229; Intermountain Rate Cases, 234 U. S. 476. The contention that this is a negative order is not sustainable even if it be limited to the very terms of the order, for that is affirmative in form and substance. If it be claimed not reviewable because there is no order directing the Seaboard what to do or refrain from doing such contention falls, because it does by necessary implication forbid the Seaboard from continuing the use of such tariff. While there is no affirmative specific authority in the statute empowering the Commission to "strike from its files" tariff schedules, it is clear that taking into consideration the requirement of the statute, 49 U. S. C. A. Section 6 (1), that a tariff in order to be lawful must be filed with the Commission and the prayer of Pollard, receiver of the Central of Georgia Railway (hereinafter called Central), that such tariff "may be declared unlawful, null and void; and that the said Receivers may be [fol. 349] required to cancel it", such order fairly interpreted is that such tariff is null and void and is cancelled. The Judgment of this Court declaring such order to "strike from its files" void would have the effect of leaving the tariff unaffected by said order of the Commission.

The fact that Congress has provided that remedy is proof conclusive that the remedy at law of disproving the legality of the order is not adequate and that there is equity in the bill.

Findings of the Commission

Has the Commission made sufficient findings of fact to justify a judgment that the order of the Commission is valid?

The "basic or essential findings required to support the Commission's orders" are necessary. Florida v. United

States, 282 U. S. 194. Lack of express findings by an administrative agency cannot be supplied by implication, A. T. & S. F. Ry. v. United States; advance sheets U. S. Supreme Ct., April 29, 1935, citing Pamora Ref. Co. v. Ryan, 293 U. S. 388, 483; Beaumont Etc. Ry. v. United States, 282 U. S. 74, 86; Interstate Commerce Commission v. Chicago Etc. RR, 186 U. S. 320, 341.

But "it is true that formal and precise findings are not required under Section 14(1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision'" * * * "That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. But Section 14(1) does not remove the necessity of making, where orders are subject to judicial review, quasi jurisdictional findings essential to "their constitutional or statutory validity". United States v. B. & O. R. R. 293 U. S. 454; advance sheets.

In the hearing before the Commission resulting in the order herein complained of, and to which hearing both the Seaboard and the Central were parties, the entire record in Finance Docket 9709 relating to the application of the Fort Benning Railroad for a certificate of public convenience and necessity was introduced by agreement. This is [fol. 350] affirmatively set forth in the report of the Commission dealing with the tariff complained of. There were thus three reports of the Commission upon which the order complained of was founded, it affirmatively appearing that they all were considered by the Commission, and it would have been inexcusable tautology to have repeated findings already made and already a part of the record.

Such findings are:

1. The United States has established on some 98,000 acres of land near Columbus, Georgia, Camp Benning and through such camp built railroad tracks connecting at Fort Benning Junction at a distance of some 6.8 miles from the delivery tracks of the Fort with both the Central and Seaboard. For a while the United States hauled freight from the junction to the delivery tracks and did the intra fort switching and than for some years the Central did such work. A contract was then made by the government with Page and Harris by which the government's railroad

tracks were to be leased to them, they were to be paid $1,000 a month for the intra switching and $5 a car for the haul from the Junction to the delivery tracks. Such lessees were to organize a railroad, procure a certificate of public convenience and necessity from the Interstate Commerce Commission and thereafter there would be no charge for the haul from the junction to the delivery tracks, Page and Harris expecting when organized as a railroad to be able to make arrangements with the trunk line carriers for a division of through rates. There were certain charges to be made for commercial shipments, not necessary to detail here. The application by the Fort Benning Railroad for a certificate of public convenience and necessity was first granted (193 I. C. C. 223) but upon a rehearing was refused (193 I. C. C. 517). Page and Harris continued the hauling and switching as private carriers. Thereafter on November 3, 1933, effective December 4, 1933, the above quoted tariff was filed by the Seaboard. The result of this was to relieve shippers over the Seaboard of all cost of hauling from the junction to the delivery tracks at the Fort. "The Seaboard employed Page and Harris as its agents to perform the transportation service in hauling cars between Fort Benning Junction and the receiving and delivery tracks at Fort Benning, and pays them [fol. 351] therefor $12.50 per car when the revenue is $25.00 or more per car, and when the revenue is less than $25.00 one half thereof". "The Central, however, has not established a tariff similar to that of the Seaboard, and since it does not publish rates to Fort Benning proper it accepts and delivers traffic intended for the Fort, except on traffic moving under government bills of lading, at Fort Benning Junction". Such freight via the Central must pay for the haul from the junction to the Fort.

2. "While the facilities may have the physical aspect of a plant facility, the circumstances of their purpose and ownership clearly distinguish them from industrially controlled and operated railroad properties in the application of regulatory policies."

3. Estimated earnings of the Fort Benning Railroad would be "the equivalent of an average of about $15. a car for the short movement between the reservation and the junction. This revenue would accrue from divisions

of joint through rates, and, therefore, would operate as a reduction, pro tanto, of the Central's or the Seaboard's revenue for the line haul". "Here the applicant (Fort Benning Railroad) and its sponsors would be the sole beneficiaries of such practices, and at the expense of established carriers whose properties are in receivership".

4. The Seaboard has by the tariff here considered extended its line over the government owned railroad to the fort.

5. "Fort Benning is not an industry and may more properly be described as a small city or town."

Order of Commission Justified

If the order of the Commission be valid though based upon an erroneous principle as stated in its report it should be sustained. It is true that the Commission in its report declared: "Our finding of unlawfulness of the tariff here under consideration, therefore, is not predicated on the fact that the Seaboard has violated Section 1(18), but rather on the fact that it has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier, and consequently it cannot pay out of its line haul rates for a service which it is not legally obligated to perform and which it cannot perform except through the employment of the contractors with the government" and also declared: "A [fol. 352] carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be used by other common carriers through switching arrangements or otherwise".

But those are not all of the declarations in the report, for we find there, after reciting the contentions of the Seaboard and Central, the latter being "that by publishing the tariff heretofore referred to and by the employment of Page and Harris as its agent to perform the transportation service over the line of railroad there considered the Seaboard and Page and Harris are now doing the very thing which we condemned by the decision in the Fort Benning Case", this statement: "Consideration has been given to the contention of the parties, but the tariff is unlawful on other grounds". Surely this does not reject the

view that such tariff is unlawful because of such arrangement but merely gives other grounds.

Apparently the only reason that the Commission did not declare as a basis for its order the fact that the Seaboard was in fact, though not in name, operating a railroad without having first obtained a certificate of public convenience and necessity was because it was misled as to the meaning of Section 1(20), 29 U. S. C. A., Section 1(20), of the Interstate Commerce Act. It is true that such section provided "Any construction, operation or abandonment contrary to the provisions of this paragraph * * * may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest." It is also true that no party in interest can initiate a proceeding before the Commission to have it in form or substance enjoin the operating of a railroad in violation of Section 1(18) of the Act. Texas & Pac. R. Co. v. Gulf Etc. R. Co., 270 U. S. 266; but "if the application for a certificate has been made he may appear there in opposition. If no such application has been made paragraph 20 affords him the only remedy". Same case. In the instant case the Central had the right to intervene and did so.

It must be borne in mind that there was no urge that the Commission enjoin the violation of Section 1(18) but [fol. 353] merely that the tariff be cancelled. Uncancelled it apparently panoplies the Seaboard against attack in courts for violation of Section 1(18). Surely the Commission must have authority after declining the issuance of a certificate of convenience and necessity to prevent the continuance of the use of its files and its apparent approval of a scheme to defeat its formal decision. No one contends that the Commission can enjoin the Seaboard from either directly or indirectly Section 1(18), any more than it could punish it criminally. But it can hardly be contended that the Commission must unwillingly acquiese in fortifying a scheme it disapproves.

Another sufficient reason for sustaining the order, and disclosed in the report of the Commission, is that the tariff unduly impairs the line haul revenue. This is authorized under the Emergency Transportation Act, 48 Stat. 212, Section 4:

"The purposes of this Title are (1) to encourage and promote or require action on the part of the carriers and of subsidiaries subject to the Interstate Commerce Act, as amended, which will * * * (b) control allowances, accessorial service and the charges therefor, and other practices affecting service or operation, to the end that undue impairment of net earnings may be prevented, and (c) avoid other wastes and preventable expense.

See New England Division Case, 261 U. S. 184; Dayton & Goose Creek Ry. Co. v. United States, 263 U. S. 458; Wallower v. United States, 32 Fed. (2nd) 524, wherein on page 527 in graphic language it is declared that the Commission has power to "prevent the carrier from cutting its own throat."

The urge of the Seaboard is that the order attacked has the effect of an injunction, even though not in such form, and thus in its brief states the duty of the court:

"The duty of the court in these circumstances has been cited in Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, 31 Sup. Ct. Rep. 288.

'Although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority (possessed by the Commission), yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power.'"

[fol. 354] Such quotation loses its cogency when it is discovered that the Court was therein merely stating the "contention". It further loses its force in this case when it is further discovered that in the said case there was apparently an effort to have it appear that the reason for setting aside a rate was because of its unreasonableness when that was not its true reason. Far different it is here.

"In a suit by the Interstate Commerce Commission to enforce an order made by it, the court is not confined in passing on the validity of the order to the reasons stated by the Commission", and

"The defendants object that the Circuit Court had no authority to decree the enforcement of the order upon any other ground than that taken by the Commission itself. We think that the Court was not confined to those grounds, and if it found the rule was, in itself, for any reason illegal as a violation of the act, the order might be valid and be a lawful order, although the Commission gave a wrong reason for making it. If it held that the rule to be a violation of one section, the order to desist might be valid, if, instead of the section named by the Commission, the Court should find that the rule was a violation of another section of the act. All of the facts being brought out before the Commission or the court, the court should decide whether the order was a lawful one, without being confined to the reasons stated by the Commission. We therefore look to see the ground taken by the Circuit Court."

Southern Pac. Co. v. Interstate Commerce Com., 200 U. S., 536, 556, 557.

"In suit to enjoin operation of order of Interstate Commerce Commission directing plaintiffs to cancel certain proposed schedules theretofore filed with the Commission, court must, if necessary, go behind reasons assigned by Commission or its counsel for making order, and determine for itself validity of order."

Wallower v. United States, 32 Fed. (2nd) 524, 529.

The contention that the order is invalid because it fixed no time for it to become effective gives us no trouble. There is no reason for fixing a date, for there is no order to do anything. It is self executing. It merely destroys, by declaring void and cancelling, a tariff—an apparent justification for an improper practice.

Counterclaim

The counterclaim of the Central is to the effect that the Seaboard should be enjoined from continuing the practice denounced by the said order if the order of the Commission should be sustained. Such Counterclaim is founded upon Equity Rule 30. The motion by the Seaboard to dismiss the counterclaim is thus set forth in the brief of the Seaboard:

[fol. 355] "(1) The counterclaim involves issues which are not germane to those of the bill of complaint and are

therefore not the proper subject of a counterclaim under Equity Rule 30.

(2) The counterclaim seeks affirmative relief from this court, which, if granted, would directly affect and disturb the possession, management and control of the property of which plaintiffs are receivers, and therefore involves a controversy which is cognizable only by the courts of their appointment. This court is accordingly without jurisdiction to adjudicate the subject matter of the counterclaim.

(3) The jurisdiction of the statutory court of three judges is limited to a determination of the validity of the order of the Interstate Commerce Commission challenged in the bill of complaint filed in this cause, and cannot be extended to the adjudication of a controversy cognizable only by a single judge."

It is difficult to conceive that it will be necessary for an injunction to be issued as prayed for by the Central after the order of the Commission shall have been declared valid, but the counterclaim, having been presented, calls for determination, especially in view of the motion to dismiss.

It is conceded that the counterclaim must be of an equitable nature and must be one of which the district court has jurisdiction.

It is urged that the counterclaim cannot be allowed in this proceeding for the reason that the Central is not a defendant to the bill as brought, the only defendant therein being the United States. A significant difference in this proceeding from one where the intervenor is a volunteer is found in the provision of the act which permits any party at interest as a matter of right, and not of grace, to intervene. See said section of the above cited Title U. S. C. A.

The most recent case cited in support of the motion to dismiss is that of Brandtjen & Kluge v. Freeman, 75 Fed. (2nd) 472, where it was held, as stated in the headnotes:

"Intervening defendant cannot inject into main suit controversy to which original defendant is not party be counterclaim against plaintiff."

A number of cases are cited to sustain this view, but the following language in the opinion would indicate that it is quite possible that if the intervening defendant had been

such as a matter of right and not of grace the decision might have been otherwise (page 473):

"Thus in the end our choice upon what we deem to be the balance of the advantage. We cannot see that it dips clearly enough to the defendant's side to disregard the decision we have cited. Besides, there is something to be said for the motion that a man should be able to keep his [fol. 356] suit in his own control, unless good reason be shown why he should not. Although it is in general desirable that as much litigation as possible should be cleared up at once other interests at times may prevail. Having to choose here between an interpretation which will in all such counterclaims or shut them all out, we choose the second."

The counterclaim is based upon an issue germane to that of the original bill, for it asks for the enjoining of the violation of an order of the Commission, which has the effect of cancelling a record which might apparently justify the continuance of the practice which has been condemned.

A sufficient answer to the second ground of the motion to dismiss is that the receivers had authority to institute the main suit with which this counterclaim is connected, and therefore that subject themselves to such counterclaims, set-offs or recoupments as might arise, even though they could not have been set up in an original suit except in the court appointing the receivers or by its permission. Further it is by no means certain that the order of the court appointing the receivers, which was introduced in evidence, is not sufficient, independent of the above, to justify consideration of the counterclaim.

By stipulation this hearing was both interlocutory and final.

FINDINGS OF FACT

1. The findings of fact by the Commission, as stated above, are adopted and made a part of these findings without repetition thereof.

2. There are no stations on the line between Fort Benning Junction and Fort Benning.

3. The volume of freight handled between Fort Benning Junction and Fort Benning is quite large and the revenue therefrom is large.

4. Under an arrangement between the Seaboard and Page and Harris the latter should receive on shipments of coal to Fort Benning a division of fifty cents out of a revenue of $1.42 and from Fort Benning Junction should receive on refined petroleum products shipped from Savannah, Georgia, to Fort Benning 33⅓% of the Seaboard's revenue and should receive comparable divisions on other commodities.

[fol. 357] 5. The Fort Benning line operated by Page and Harris is not an extension, branch, connecting track, or cut off or any other line of railroad.

6. The line from Fort Benning Junction to Fort Benning is not a spur, industrial, switching, or side track, as defined in Section 1(22) of the Interstate Commerce Act. The haul from the junction to the Fort is a line haul service extending beyond the point that the Seaboard or any other railroad is entitled to operate and to which point beyond the junction no tariff as a line haul applies.

7. The Seaboard has not received a certificate of public convenience and necessity to extend its line from the junction to the Fort.

8. The Seaboard has not obeyed the order of the Commission attacked in this case and is continuing to absorb the charges of Page and Harris on all freight shipped by the Seaboard and moving between Fort Benning Junction and the receiving and delivery tracks at Fort Benning and is otherwise conforming to its practices and arrangements which were in effect prior to the order of the Commission.

9. The order appointing the receivers of the Seaboard provides, among other matters, as follows:

"Said receivers are authorized and empowered to institute and prosecute, within this judicial District or elsewhere, in any court or before any officer, department, commission, or other tribunal, and in their own names as receivers or in the name of the Railway Company as they may be advised by counsel, all such actions, proceedings or suits as in their judgment may be necessary for the recovery or proper protection of said property, or any part thereof, and the discharge of their trust, and likewise to appear in and defend any and all actions, proceedings or

suits which may be instituted and prosecuted against them as receivers in or before any such tribunal."

Conclusions of Law.

1. This court has jurisdiction to review the order of the Interstate Commerce Commission attacked in this cause.

2. The order of the Interstate Commerce Commission striking the Seaboard's tariff from its files is lawful and valid.

[fol. 358] 3. The counterclaim is germane to the main suit, is equitable in nature, is cognizable by a United States District Court, and this statutory court being necessary to consider the main case it has jurisdiction of the counterclaim; and is entitled to a permanent injunction against the operation by the Seaboard under its tariff as prayed.

Let a decree be entered accordingly.

This 31st day of May, 1935.

———, United States Circuit Judge. (S.) Wm. H. Barrett, United States District Judge. (S.) Bascom S. Deaver, United States District Judge.

[File endorsement omitted.]

[fol. 359] In United States District Court

Dissenting Opinion—Filed June 3, 1935

Sibley, Circuit Judge, Dissenting:

I agree that the Commission's order is one that we have jurisdiction to set aside, and that its failure to name an effective date does not invalidate it, but I do not think the Commission has made findings sufficient to support it. Atcheson, Topeka & S. F. Ry. vs. United States, — U. S. —, decided April 29th, 1935. The putting in evidence of the former proceeding in which Page and Harris were denied a certificate of public convenience did not make the findings in that case findings in this one. The Seaboard Air Line Railway Company and its receivers were not parties to that proceeding and Page and Harris are not parties to this one. The Commission did not there hold

that it was against the public convenience for anyone to operate the Fort Benning tracks. On the contrary, its position was that for reasons of economy they should not be operated as a short line but that some connecting carrier should operate them. This the Seaboard is attempting to do. Its doing so is no evasion of the Commission's former order, but is in conformity with it. The real objection is that the Seaboard is doing it free. The Commission perhaps thinks it unwise or unreasonable that it be done free, but it has made no such fact finding. If it had, its order might stand, but cannot stand without it. The fact is of the class peculiarly for determination by the Commission. The Commission distinctly disclaims as a ground for its order that the Seaboard is operating to Fort Benning without a certificate of public convenience, and concedes that a court injunction under Interstate Commerce Act Section 1 (20) is the exclusive statutory remedy for that. Its statement that "A carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be used by other common carriers through switching arrangements or otherwise", will not support the order. The first clause is bad in law, for carriers daily and everywhere switch over privately owned tracks. If they are going to do so the Act merely requires that the filed tariff so state, with the charge to be made for the service. The last clause is also wrong in fact, for the proof and the finding of the Commission are that the other common carrier, the Central, can if it wishes make the same switching arrangements which the Seaboard has. The Commission raises a question of the validity of the right by which the Government's tracks are being used, but it does not lie with the Commission to object if the Government is not objecting, nor to inquire into the title of the carrier to the tracks used. Cleveland Ry. vs. United States, 275 U. S. 405 (8). The Commission says: "Our finding of unlawfulness of the tariff under consideration, [fol. 360] therefore, is not predicated on the fact that the Seaboard has violated Section 1 (18), but rather on the fact that it has published rates to and from Fort Benning, a station not on its lines and which cannot be reached by it or any other common carrier." This is not true in fact, for the Seaboard's tariffs read as they always did to For-

Benning Junction. The amendment which is cancelled proposes to switch free on to Fort Benning. It is as though a mill owned trucks to its mill village, whether near or far, and the Seaboard was proposing to switch free over them. The Commission's last position: "And consequently it can not pay out of its line haul rates for a service which it is not legally obligated to perform and which it cannot perform except through the employment of contractors with the Government" begs the question. If this service is switching requiring no certificate of public convenience but only a filed tariff, it becomes, after the tariff is filed, one which the carrier is obligated to perform. If instead of hiring its own crew to do it it hires Page and Harris, it should pay them. It is wholly immaterial whether Page & Harris own the trucks, lease them or contract otherwise with their owners. The true questions are: First, whether this is switching, or operating an extension without a certificate of public convenience, to be tested exclusively by a suit for injunction. Second, can the Seaboard afford financially to do what it is doing, or is the switching service unreasonably cheap. The Commission might so find, but is has not.

The Central has sought by a so-called counterclaim to litigate the first of the two stated questions. The Seaboard's objection thereto ought to be sustained. Equity Rule 30 as to equitable counter-claims refers to defendants whom the plaintiff has impleaded. The receivers of the Seaboard sued the United States in the Southern District of Georgia where they themselves are not liable to suit. The Central has intervened to support the attacked order, as it has a statutory right to do. The proceeding is by statute before a specially organized court, and the appeal provided is an extraordinary one direct to the Supreme Court. Such a case is not to be complicated even by the plaintiff with matters of ordinary equity triable by one judge with appeal to the Circuit Court of Appeals. Pittsburgh Ry. Co. vs. United States, 281 U. S. at page 488. Much less can an intervenor drag such in and also obtain a venue which he could not otherwise have had. In Chicago Junction case, 264 U. S. 259, there was no injection of another cause of action but only a bringing into the case of parties who had acted on the attacked order that they [fol. 361] might defend it and be bound by the result. The

Court of three Judges ought to strike the so-called counterclaim.

Samuel H. Sibley, United States Circuit Judge.

[File endorsement omitted.]

[fol. 362] In United States District Court, Southern District of Georgia, Savannah Division

In Equity. No. 325

Leigh R. Powell, Jr., and Henry W. Anderson, Receivers Seaboard Air Line Railway Co.,

v.

United States of America et al.

H. D. Pollard, Receiver Central of Georgia Railway Company, Intervenor

Final Decree—Filed June 4, 1935

This case having come on to be heard before the court composed of Honorable Samuel H. Sibley, Circuit Judge, Honorable William H. Barrett, District Judge, and Honorable Bascom S. Deaver, District Judge, upon the application of the complainants for an interlocutory injunction setting aside and restraining the enforcement of the order of the Interstate Commerce Commission complained against; and the defendants having filed their answer to the bill of complaint, the answer of the United States of American containing a preliminary motion to dismiss the bill of complaint, and the answer of H. D. Pollard, receiver of the Central of Georgia Railway Company, in addition to answering the merits of the bill of complaint, setting up a counterclaim against the complainants and praying for an injunction against them on the said counterclaim; and the complainants having filed a motion to strike said counterclaim of H. D. Pollard, receiver as aforesaid; and it being thereupon stipulated that the above stated motions should be taken under advisement by the court, and that all answers should be filed subject to said motions, and the complainants having filed their answer to the counter-

claim of H. D. Pollard, receiver as aforesaid; and it thereupon having been further stipulated that, subject to the said motion to dismiss the bill of complaint filed by the United States of America, and subject to the motion to strike the said counterclaim filed by the complainants, the whole case, including the counterclaim, should forthwith proceed to final hearing; and the evidence having been submitted and the case being fully argued;

In pursuance of and in conformity with the opinion rendered in said cause it is Ordered, Considered and Adjudged, on final decree, as follows:

1. That the motion of the United States of America to dismiss the bill of complaint, which motion is contained in its answer as its "First Defense", be and the same is hereby overruled and denied.

[fol. 363] 2. That the motion of the complainants to strike the counterclaim of H. D. Pollard, as receiver as aforesaid, be and the same is hereby denied and overruled.

3. That the order of the Interstate Commerce Commission complained against in the above stated bill of complaint is legal and valid, and the prayer of complainants to decree said order as invalid and unlawful is denied.

4. That the counterclaim filed by H. D. Pollard, as receiver of the properties and assets of Central of Georgia Railway Company, against Legh R. Powell, Jr., and Henry W. Anderson, as receivers of Seaboard Air Line Railway Company, in his answer to the above stated bill of complaint, is hereby allowed; and the said Legh R. Powell, Jr., and Henry W. Anderson, as receivers of the properties and assets of Seaboard Air Line Railway Company, their agents and servants, and all other persons in active concert or participating with them, and each of them, are hereby perpetually enjoined and restrained from extending the line of the Seaboard Air Line Railway from Fort Benning Junction, Georgia, to the receiving and delivery track at Fort Benning, Georgia, and from operating the line of railway extending between said points, without obtaining from the Interstate Commerce Commission a Certificate of Public Convenience and Necessity as required under the provisions of paragraphs (18), and (20) of Section 1 of the Interstate Commerce Act; and said persons and each of them

are further enjoined and restrained from using the switching tariff of the receivers of the Seaboard Air Line Railway (filed with the Interstate Commerce Commission November 3, 1933, and effective December 4, 1933, copy of which is attached to the bill of complaint in this case as Exhibit 2), and from carrying out the contract of June 7, 1934, between the receivers of Seaboard Air Line Railway and said Page and Harris (a copy of which is attached to the bill of complaint in this case as Exhibit 3), as devices to accomplish the purpose of the said receivers of Seaboard Air Line Railway to extend the line of Seaboard Air Line Railway from Fort Benning Junction to Fort Benning or to operate the line of Railway between said points without a certificate from the Commission as aforesaid.

5. Dice Schmidt Construction Company, J. M. Browder, doing business as Browder Brothers, J. S. McCauley & Company, and Roquemore Gravel and Slag Company each filed motions for leave to intervene in the above stated case, and filed their interventions, but no formal order was taken allowing the interventions but they were all before the court. The intervenors were all shippers of freight to Fort Benning and aligned themselves with the complain-[fol. 364] ants and adopted the allegations of the complaint and prayed the same relief. This decree having declared valid the order of the Interstate Commerce Commission attacked by the original complainants and having denied the prayer of the original complaint to declare such order invalid and unlawful such decree is equally applicable to each of such intervenors.

6. Let the cost be taxed against the complainants.

This June 1st, 1935.

Bascom S. Deaver, United States District Judge.
Wm. H. Barrett, United States District Judge.

[File endorsement omitted.]

[fol. 365] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 19, 1935

To the Honorable Judges of the District Court of the United States for the Southern District of Georgia:

Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, plaintiffs herein, deeming the final order or decree entered in this cause on June 4, 1935, to be erroneous and inequitable, and feeling themselves greatly prejudiced and aggrieved thereby, pray an appeal to the Supreme Court of the United States from said decree insofar as it (1) denies the prayer of the bill of complaint herein that the enforcement, operation and execution of the order of the Interstate Commerce Commission therein complained of be forever enjoined, that said order be declared without warrant of law and beyond the lawful authority of said Commission, and that it be set aside and forever annulled; (2) denies and overrules the plaintiffs' motion to strike the counterclaim of H. D. Pollard, Receiver of Central of Georgia Railway Company, intervening defendant; and (3) allows said counterclaim and perpetually enjoins and restrains plaintiffs and their agents from operating the track between Fort Benning Junction, Georgia, and the Fort Benning Military Post without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity pursuant to the provisions of paragraphs (18), (19) and (20) of Section 1 of the Interstate Commerce Act.

The errors for which your petition-s claim to be entitled to the appeal herein prayed for are more fully set out in the assignment of errors filed with the Clerk of this Court pursuant to Rule 9 of the Rules of the Supreme Court of [fol. 366] the United States; and there has been likewise filed herewith the statement required by Rule 12 of said Rules disclosing the basis for the jurisdiction of the Supreme Court of the United States to review said order or decree.

Wherefore, in order that your petitioners may obtain relief in the premises and have an opportunity to show

the errors complained of, your petitioners pray for an allowance of an appeal in this cause to the Supreme Court of the United States pursuant to the statutes and rules of said Court; that a true copy of the material parts of the record herein, including the assignment of errors, shall be made and transmitted to said Court in the manner and form prescribed by Rule 10 of the Rules of said Court, and that such further order or orders be made as may appear to this Court necessary or proper for the allowance of the appeal herein prayed.

July 10th, 1935

W. R. A. Cocks, Charles T. Abeles, J. Randolph Anderson, Solicitors for Plaintiffs

[File endorsement omitted.]

[fol. 367] In United States District Court

[Title omitted]

Assignment of Errors Filed July 49, 1935

Come now Legh R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, plaintiffs herein, and with their petition for appeal contemporaneously filed herewith submit the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from final decree entered on the 4th day of June, 1935, by said Court in the above entitled cause:

A. With Respect to the Bill of Complaint

1. The said District Court erred in decreeing that the prayer of the plaintiffs for an order setting aside, annulling and perpetually enjoining the enforcement, operation and execution in whole of the order of the Interstate Commerce Commission herein complained of be denied.

2. The said District Court erred in decreeing said order to be legal and valid.

3. Said District Court erred in failing to find and decree said order to be beyond the lawful authority of the

Interstate Commerce Commission and therefore null and void.

4. The said District Court erred in failing to find that said order is null and void because it is wholly without support of evidence of record.

5. The said District Court erred in failing to find that said order is null and void because it does not contain basic or essential findings necessary to support it.

6. The said District Court erred in failing to find and decree said order null and void because it does not prescribe the date as of which it shall become effective.

7. Said District Court erred in failing to find and decree that said order is null and void because in purpose and effect it restrains a supposed violation of paragraph (12) of Section 1 of the Interstate Commerce Act, an action [fol. 368] which is beyond the lawful power of said Commission.

8. Said District Court erred in finding that said order is lawful and valid because the Commission has the power and authority to strike a tariff from its files for the purpose of preventing a supposed violation of paragraph (12) of Section 1 of the Interstate Commerce Act.

9. Said District Court erred in failing to find that said order is unlawful, null and void because the Commission has no power to strike from its files a tariff theretofore filed with the Commission and conforming in all respects to legal and administrative requirements.

10. Said District Court erred in finding that said order is lawful and valid because the Commission has the power to prevent plaintiffs from unduly impairing their revenue, the record herein containing no evidence whatsoever supporting a finding of such impairment of revenue.

11. Said District Court erred in failing to enter a final decree herein perpetually and forever enjoining the enforcement, operation and execution in whole of said order and adjudicating, ordering and declaring said order to be without warrant of law as beyond the lawful authority of said Commission, and that said order be set aside and forever annulled.

B. With Respect to the Counterclaim

12. The said District Court erred in denying the plaintiffs' motion to dismiss the counterclaim of Intervenor H. D. Pollard, as Receiver of the Properties and Assets of Central of Georgia Railway Company.

13. The said District Court erred in failing to hold that said counterclaim involved issues not germane to those of the bill of complaint and therefore was not the proper subject matter of a counterclaim under Equity Rule 30.

14. The said District Court erred in failing to hold that, because said counterclaim sought affirmative relief which, if granted, would directly affect and interfere with the possession, operation and control of the properties of which plaintiffs are Receivers, said counterclaim and the relief therein sought were matters within the exclusive jurisdiction of the courts appointing plaintiffs Receivers, and were accordingly beyond the jurisdiction of the said District Court of the United States for the Southern District of Georgia.

15. The said District Court erred in holding that by filing their bill of complaint therein the plaintiffs subjected themselves to the jurisdiction of said District Court and conferred upon said Court the power to entertain said counterclaim.

16. The said District Court erred in failing to hold that, being a three judge court convened pursuant to the provi- [fols. 369-374] sions of the Act of October 22, 1913, 38 Stat. 220 (U. S. C. A., Title 28, Sec. 47), its jurisdiction was limited to the determination of the validity of the order of the Interstate Commission Commission sought to be enjoined by the bill of complaint in this cause, and did not extend to the consideration and adjudication of the issues raised by said counterclaim which were properly cognizable only by a single judge.

17. The said District Court erred in that the decree granting the relief prayed in said counterclaim was made and signed by the majority of said three judge court convened pursuant to the Act of October 22, 1913, as aforesaid, whereas said counterclaim was cognizable only by a

single judge and therefore beyond the jurisdiction of said court of three judges.

18. The said District Court erred in failing to find that the track from Fort Benning Junction, Georgia, to Fort Benning is a spur, industrial, switching or side track within the meaning of paragraph (22) of Section 1 of the Interstate Commerce Act and in finding that the plaintiffs' operation of said track is a line haul service.

19. The said District Court erred in allowing said counterclaim and in enjoining and restraining plaintiffs from operating said track between Fort Benning Junction and Fort Benning without obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity as required by paragraphs (18), (19), and (20) of Section 1 of the Interstate Commerce Act.

For which errors the plaintiffs pray that the said decree be reversed and the said District Court be directed to grant the relief prayed in the bill of complaint and the plaintiffs' motion to strike the counterclaim of H. D. Pollard, as Receiver of the properties and assets of Central of Georgia Railway Company, intervening defendant.

W. R. C. Cocke, Charles T. Abeles, J. Randolph Anderson, Solicitors for Plaintiffs.

[File endorsement omitted.]

[fols. 375-379] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed July 24, 1935

The petition of the plaintiffs in the above entitled cause for an appeal to the Supreme Court of the United States from the judgment of the District Court of the United States for the Southern District of Georgia having been filed herein, accompanied by an Assignment of Errors and Statement as to Jurisdiction, all as provided by Rules 9 and 12 of the Rules of the Supreme Court of the United

States, and the said papers having been presented to this Court and the record in this cause having been considered.

It is hereby Ordered that an appeal be, and it is hereby, allowed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Southern District of Georgia entered in this cause on the 4th day of June, 1925, and that the Clerk of this Court shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of this Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the appellants shall give a good and sufficient cost bond in the sum of Five Hundred ($500.00) Dollars, conditioned as required by law.

Done by this Court, this 22nd day of July, 1925.

Wm H Barrett, District Judge

[File endorsement omitted.]

[fols. 230-231] Citation, in usual form, showing service on H H Pollard et al, filed July 24, 1925, omitted in printing.

[fol. 232] In United States District Court

[Title omitted]

Order of Severance. Filed July 24, 1925

It appearing to the Court that the final decree herein from which an appeal to the Supreme Court of the United States is prayed by Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, plaintiffs, vs. against certain parties who, having filed petitions for leave to intervene, were before the Court, that all such parties have been served with notice of said appeal and have refused to join therein, and have consented to the entry against them of an order of severance barring them from said appeal.

It is Therefore Ordered that the said Leigh R Powell, Jr. and Henry W Anderson, as Receivers, are granted a supersedeas and have leave to appeal herein pending the said intervening petition thereto

July 22nd, 1935

Wm H Barrett District Judge

[File endorsement omitted.]

[fol 294] In United States Circuit Court of Appeals

[Title omitted]

Notice of Appeal Filed July 23, 1935

To the United States of America:

Please take notice that Leigh R Powell, Jr. and Henry W Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, plaintiffs in the above entitled cause, have appealed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Southern District of Georgia, heretofore made and entered in said cause on the 4th day of June, 1935.

Dated July 23rd, 1935

W H C Cocke, Chas T Abules, J Randolph Anderson, Solicitors for Plaintiffs

Acceptance of Service

Service of the foregoing notice of appeal is hereby acknowledged by the United States of America this 23rd day of July, 1935.

Elmer B. Collins, Special Assistant to the Attorney General.

[File endorsement omitted.]

[fol. 385] In United States District Court

[Title omitted]

Notice of Appeal. Filed July 29, 1935

To the Interstate Commerce Commission:

Please take notice that Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets o Seaboard Air Line Railway Company, plaintiffs in th above entitled cause, have appealed to the Supreme Cour of the United States from the final decree of the Distric Court of the United States for the Southern District o Georgia, heretofore made and entered in said cause on th 4th day of June, 1935.

Dated July 23rd, 1935.

W. R. C. Cocke, Chas. T. Abeles, J. Randolph Ander son, Solicitors for Plaintiffs.

Acceptance of Service

Service of the foregoing notice of appeal is hereby ac knowledged by the Interstate Commerce Commission thi 25 day of July, 1935.

E. M. Reidy, Solicitor for the Interstate Commerce Commission.

[File endorsement omitted.]

[fol. 386] In United States District Court

[Title omitted]

Notice of Appeal—Filed July 31, 1935

To H. D. Pollard, as Receiver of the Properties and Assets of Central of Georgia Railway Company:

Please take notice that Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets o Seaboard Air Line Railway Company, plaintiffs in the above entitled cause, have appealed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Southern District o

Georgia, heretofore made and entered in said cause on the 4th day of June, 1935.

Dated July 23rd, 1935.

W. R. C. Cocke, Chas. T. Abeles, J. Randolph Anderson, Solicitors for Plaintiffs.

Acceptance of Service

Service of the foregoing notice of appeal is hereby acknowledged by H. D. Pollard, as Receiver of the Properties and Assets of Central of Georgia Railway Company, this 26 day of July, 1935.

T. M. Cunningham & A. R. Lawton, Jr., Solicitor for H. D. Pollard, as Receiver of the Properties and Assets of Central of Georgia Railway Company.

[File endorsement omitted.]

[fol. 387] In United States District Court

[Title omitted]

Notice of Appeal—Filed July 31, 1935

To Honorable M. J. Yeomans, Attorney General of the State of Georgia:

You are hereby notified that Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, plaintiffs in the above entitled cause, have appealed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Southern District of Georgia, heretofore made and entered in said cause on the 4th day of June, 1935.

Dated July 23rd, 1935.

W. R. C. Cocke, Chas. T. Abeles, J. Randolph Anderson, Solicitors for Plaintiffs.

Service of the foregoing notice is hereby acknowledged this 26th day of July, 1935.

M. J. Yeomans, Attorney General of the State of Georgia.

[File endorsement omitted.]

[fols. 388-391] Bond on Appeal for $500.00, approved July 31, 1935, omitted in printing.

[fols. 392-397] Orders enlarging time for filing a præcipe, for preparing and lodging the statement of evidence to be included in the record on appeal, and for docketing the appeal and filing the record thereof with the Clerk of the Supreme Court of the United States omitted in printing.

[fol. 398] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed August 11, 1936

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record in this cause to be transmitted to the Supreme Court of the United States pursuant to the appeal to said Court heretofore taken, and incorporate in such transcript the following portions of the record in this cause:

1. Bill of Complaint and all exhibits filed therewith.
2. Order convening Court of Three Judges.
3. Answer of the United States of America.
4. Intervention of Interstate Commerce Commission.
5. Answer of Interstate Commerce Commission.
6. Intervention of H. D. Pollard, Receiver of Central of Georgia Railway Company.
7. Order granting petition of H. D. Pollard, Receiver, for leave to intervene.
8. Answer and counter-claim of H. D. Pollard, Receiver, omitting Exhibits "A" and "B", which are copied in the Statement of Evidence and Proceeding as Exhibits "A" and "B" to the application of Fort Benning Railroad Company before the Interstate Commerce Commission, Finance Docket No. 9709.
9. Plaintiff's motion to strike counter-claim of H. D. Pollard, Receiver.
10. Plaintiff's reply to counter-claim of H. D. Pollard, Receiver.

11. Statement of evidence and proceedings before the statutory three-judge Court, the stipulation of Counsel with respect thereto and the order of the court approving the statement.

12. Opinion of three-judge statutory court, including the findings of fact and conclusions of law.

13. Dissenting opinion of Judge Sibley.

14. Final Decree denying motion to dismiss, sustaining the validity of the Commission's order and granting the prayer of the counterclaim of Pollard, Receiver.

15. Petition for appeal filed July 19, 1935.

[fol. 399] 16. Assignment of Errors.

17. Statement as to jurisdiction of the Supreme Court to entertain the appeal.

18. Order allowing appeal.

19. Notices required by the Supreme Court Rule 12, to, and acknowledgements of service by:

(a) The United — of America.
(b) The Interstate Commerce Commission.
(c) H. D. Pollard, Receiver.
(d) The Attorney General of the State of Georgia.

20. Citation issued to the Attorney General of the United States, Interstate Commerce Commission, and H. D. Pollard, Receiver.

21. Order of Severance.

22. Notice of Appeal to and acknowledgement of service by:

(a) The United State- of America.
(b) The Interstate Commerce Commission.
(c) H. D. Pollard, Receiver.
(d) The Attorney General of the State of Georgia.

23. Cost Bond.

24. The order of the Court enlarging the time for filing a præcipe for preparing and lodging a statement of the evidence and for docketing the appeal and filing the record thereof with the Clerk of the Supreme Court of the United States, viz:

(a) The order of August 22, 1935, enlarging the time until and including October 31, 1935.

(b) The order of October 4, 1935, extending the time until and including December 31st, 1935.

(c) The order of December 19, 1935, extending the time until and including March 1, 1936.

(d) The order of February 24, 1936, extending the time until and including April 30, 1936.

(e) The order of April 23rd, 1936, extending the time until and including June 29, 1936.

(f) The order of June 18, 1936, extending the time until and including August 28, 1936.

25. Præcipe for transcript of record.

26. Clerk's Certificate of transcript of record.

Dated —— —, ——.

—— ——, —— ——, Solicitors for Plaintiffs.

[fol. 400] Acknowledgment of Service

Legal and timely service of a copy of the foregoing præcipe for transcript of the record is hereby acknowledged on the dates set opposite our names. We have read the above præcipe and do not desire to file a separate præcipe designating any additional portions of the records to be included in the transcript.

Elmer B. Collins, Special Assistant to the Attorney General.

July 13, 1936.

Edward M. Reidy, Solicitor for the Interstate Commerce Commission.

July 13, 1936.

T. M. Cunningham, Solicitor for H. D. Pollard, Receiver.

July 16, 1936.

[File endorsement omitted.]

[fol. 401] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 402] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY, AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed August 19, 1936

Come now the Appellants in the above-entitled cause and state that the points upon which they intend to rely in this Court are as follows:

Point 1

The order of the Interstate Commerce Commission of February 5, 1935, is wholly null and void and subject to annulment at the suit of these Appellants for the following reasons:

(1) The tariff of the Appellants which the order of the Commission requires to be stricken from the Commission's files is not unlawful for the reasons assigned by the Commission, nor is there any other lawful ground which would sustain a finding by the Commission that the tariff is in violation of Section 6 of the Interstate Commerce Act or of any other provision of law.

(2) The order condemns the Appellants' tariff as a violation of Section 6 of the Interstate Commerce Act without designating the provisions of that section with which it is deemed to conflict or otherwise apprising the Appellants of the specific violation with which they are charged. The order therefore lacks the certainty and precision which are [fol. 403] requisite to sustain an order of the Commission.

(3) Although the order of the Commission purports to be based upon a violation by Appellants of Section 6 of the Interstate Commerce Act, the real purpose and effect of the order, as clearly disclosed by the report of the Commission and by the record as a whole, are to restrain a supposed violation of paragraph (18) of Section 1 of the Interstate Commerce Act, providing:

"After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in trans-

portation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, * * *"

Paragraph (20) of Section 1 of said Act provides in part:

"From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *"

The remedy for violation of paragraph (18) furnished by paragraph (20) is plenary and exclusive, and in attempting to enforce this paragraph indirectly by condemning the Appellants' tariff the Commission has exceeded its powers and contravened the procedural requirements of law.

(4) The Commission is without power under the Interstate Commerce Act or any other law to strike from its files a tariff theretofore filed with it and conforming in all respects to legal and administrative requirements.

Point 2

The statutory three-judge court erred in the following respects:

(1) In failing to adjudge and decree the order of the [fol. 404] Interstate Commerce Commission of February 5, 1935, to be null and void for the reasons stated in Point 1, and in failing to enter a final decree enjoining the enforcement, operation and execution of said order.

(2) In ruling that the Commission could lawfully require the tariff of the Appellants to be stricken from the Com-

mission's files to prevent a supposed violation by Appellants of paragraph (18) of Section 1 of the Interstate Commerce Act, said ruling being clearly disclosed by the following excerpt from the Court's opinion:

"It is true that the Commission in its report declared: 'Our finding of unlawfulness of the tariff here under consideration, therefore, is not predicated on the fact that the Seaboard has violated section 1(18), but rather on the fact that it has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier, and consequently it cannot pay out of its line haul rates for a service which it is not legally obligated to perform and which it cannot perform except through the employment of the contractors with the government' and also declared: 'A carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be used by other common carriers through switching arrangements or otherwise.'

"But those are not all of the declarations in the report, for we find there, after reciting the contentions of the Seaboard and Central, the latter being 'that by publishing the tariff heretofore referred to and by the employment of Page and Harris as its agent to perform the transportation service over the line of railroad there considered the Seaboard and Page and Harris are now doing the very thing which we condemned by the decision in the Fort Benning Case', this statement: 'Consideration has been given to the contention of the parties, but the tariff is unlawful on other grounds'. Surely this does not reject the view that such tariff is unlawful because of such arrangement but merely gives *other* grounds.

"Apparently the only reason that the Commission did not declare as a basis for its order the fact that the Seaboard was in fact, though not in name, operating a railroad without having first obtained a certificate of public convenience and necessity was because it was misled as to the meaning of Sec. 1(20), 49 U. S. C. A., Sec. 1(20), of the Interstate Commerce Act. It is true that such section provides: 'Any construction, operation or abandonment contrary to the provisions of this paragraph * * * may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or

regulating body of the State or States affected, or an party in interest.' It is also true that no party in interes can *initiate* a proceeding before the Commission to hav it in form or substance enjoin the operating of a railroa in violation of Sec. 1(18) of the Act, 49 U. S. C. A., Sec 1(18). Texas & Pac. R. Co. v. Gulf Etc. R. Co., 270 U. S. 26 46 S. Ct. 263, 264, 70 L. Ed. 578; but 'if application for certificate has been made he may appear there in opposi [fol. 405] tion. If no such application has been made para graph 20 affords him the only remedy'. Id. In the instan case the Central had the right to intervene and did so.

"It must be borne in mind that there was no urge tha the Commission enjoin the violation of Sec. 1(18), 49 U. S C. A., Sec. 1(18), but merely that the tariff be cancelled Uncancelled it apparently panoplies the Seaboard agains attack in courts for violation of Sec. 1(18). Surely th Commission must have authority after declining the issu ance of a certificate of convenience and necessity to preven the continuance of the use of its files and its apparent ap proval of a scheme to defeat its formal decision. No on contends that the Commission can enjoin the Seaboar from either directly or indirectly violating Sec. 1(18), an more than it could punish it criminally. But it can hardl be contended that the Commission must unwillingly ac quiesce in fortifying a scheme it disapproves."

(3) In ruling that the Commission could lawfully requir the tariff to be stricken from the Commission's files be cause it unduly impairs the line haul revenue of the Ap pellants, although the Commission made no finding of such impairment, and there was no evidence whatsoever befor the Commission or the statutory court which would sup port such a finding.

(4) In denying the motion to strike the counterclaim o Intervenor H. D. Pollard, Receiver, filed by Appellants o the following grounds:

(a) that said counterclaim attempts to assert an inde pendent cause of action neither related nor germane to th issues raised by the Appellants' bill of complaint, and is not therefore a counterclaim properly pleadable within th permissible limits of Federal Equity Rule 30;

(b) that because it sought affirmative relief which, if granted would directly affect and interfere with the pos-

session, operation and control of the properties of which Appellants are Receivers, said counterclaim and the relief therein sought were matters within the exclusive jurisdiction of the courts appointing Appellants Receivers, and were accordingly beyond the jurisdiction of the statutory court before which this cause was tried;

[fol. 406] (c) that by filing their bill of complaint therein Appellants did not subject themselves to the jurisdiction of the statutory court or confer upon that court the power to entertain the counterclaim;

(d) that having been convened pursuant to the provisions of the Act of October 22, 1913, 38 Stat. 220 (U. S. C. A., Title 28, Sec. 47), the jurisdiction of the Statutory Court was limited to the determination of the legality of the order of the Commission sought to be enjoined by the bill of complaint in this cause, and did not extend to the consideration and adjudication of the issues raised by said counterclaim which were cognizable only by a District Court consisting of a single judge and exercising the ordinary jurisdiction of a United States District Court.

(5) In that the statutory court of three judges assumed power to grant the relief prayed in said counterclaim, as evidenced by the signatures of a majority of said statutory court to the decree granting such relief, whereas said counterclaim was cognizable only by a District Court consisting of a single judge, and was therefore beyond the jurisdiction of said court of three judges.

(6) In failing to adjudge and decree that the track from Fort Benning Junction, Georgia, to Fort Benning, Georgia, is a spur, industrial or switching track within the meaning of paragraph (22) of Section 1 of the Interstate Commerce Act, the operation of which is not a line haul service and therefore does not require a certificate of public convenience and necessity from the Interstate Commerce Commission.

(7) In allowing the counterclaim and enjoining and restraining Appellants from operating the track between Fort Benning Junction and Fort Benning or using the Appellants' switching tariff involved in this cause without Appellants' first having obtained from the Interstate Com-

merce Commission a certificate of public convenience and necessity under the provisions of paragraph (18) of Sec- [fol. 407] tion 1 of the Interstate Commerce Act.

The Appellants further state that printing of the entire record as filed is necessary for the consideration of the case.

W. R. C. Cocke, Chas. T. Abeles, Solicitors for Appellants.

Dated July 30, 1936.

Acknowledgment of Service

Service of the foregoing statement of points upon which Appellants intend to rely and designation of the parts of the record to be printed is hereby acknowledged on the dates set opposite our names.

Elmer B. Collins, Special Assistant to the Attorney General.

August 3, 1936.

Edward M. Reidy, Solicitor for the Interstate Commerce Commission.

July 31, 1936.

T. M. Cunningham, Solicitor for H. D. Pollard, Receiver.

August 11, 1936.

[fol. 408] [File endorsement omitted.]

Endorsed on cover: File No. 40835. S. Georgia, D. C. U. S. Term No. 295. Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company, Appellants, vs. The United States of America, et al. Filed August 19th, 1936. Term No. 295, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

In Equity.

No. 325

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA ET AL.,

Appellees.

APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

STATEMENT AS TO JURISDICTION.

The appellants, in support of the jurisdiction of the Supreme Court to review the above-entitled cause on appeal, respectfully represent:

(a) The Statutory Provisions Sustaining Jurisdiction.

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 938 (U. S. C., Tit. 28, Sec. 345), provides as follows:

> A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District

Court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * * * * * *

(4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

The Urgent Deficiencies Act of October 22, 1913, Ch. 32, 38 Stat. 219 (U. S. C., Tit. 28, Sec. 41 (28)), confers jurisdiction upon the District Court "of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission." By the same Act, Ch. 32, 38 Stat. 220 (U. S. C., Tit. 28, Sec. 47a), review by the Supreme Court of decrees entered in such cases is provided as follows:

> A final judgment or decree of the District Court * * * may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

(b) **Date of Decree, and Date of Application for Appeal.**

The final decree sought to be reviewed was made and entered on June 4, 1935.

Application for appeal was presented on July 23rd, 1935, together with an Assignment of Errors.

(c) **Nature of the Case and Rulings of the Court Below.**

The appellants, the duly appointed and qualified receivers of a common carrier by railroad subject to the In-

terstate Commerce Act, filed with the Interstate Commerce Commission a tariff, known as I. C. C. No. A-6826, Sixth Revised Page 139, effective December 4, 1933, extending the switching limits of Fort Benning Junction, Georgia, a station on appellants' line, to include certain tracks within Fort Benning, an adjacent Military Post. On May 1, 1934, H. D. Pollard, as Receiver of the Central of Georgia Railway Company, filed a complaint with the Commission alleging that the tariff and the services rendered thereunder were unlawful, and asking the Commission to require its cancellation and order the appellants, among others, to cease and desist from asserted violations of law growing out of the use of said tariff. After due hearing and argument in the proceeding, designated as Docket No. 26483, the Commission under date of February 5, 1935, entered the following order:

> This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and said Commission in said report having found the provision of the Seaboard Air Line Railway Company Schedules, I. C. C. No. A-6826, Sixth Revised Page 139, effective December 4, 1933, that "Fort Benning Junction, Ga., switching limits include the receiving and delivery tracks at Fort Benning Military Post" to be unlawful:
>
> It is ordered, That Sixth Revised Page 139 of said Schedules, be, and it is hereby, stricken from the files of this Commission.
>
> By the Commission.
>
> [SEAL.] GEORGE B. McGINTY,
> *Secretary.*

Following the Commission's denial of a petition by appellants for reargument and reconsideration, appellants promptly filed their bill of complaint in the District Court of the United States for the Southern District of Georgia, asserting that the tariff in question was lawful, that the Commission's order, and the report incorporated therein, were based upon erroneous principles of law and exceeded the lawful powers of the Commission, and praying, among other things, for a decree perpetually enjoining the enforcement, operation and execution of said order, and that it be set aside and forever annulled.

The Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 220 (U. S. C. A., Title 28, Section 47) provides in part as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court, of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. * * * and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges * * * shall apply."

Pursuant to the requirements of this Act the Honorable William H. Barrett, upon the filing of the complaint herein, duly entered an order calling to his assistance to hear and

determine the cause the Honorable Samuel H. Sibley, United States Circuit Judge, and the Honorable Bascom S. Deaver, United States District Judge, and thereafter all proceedings below were had before, and the decree herein appealed from was made in its entirety by, the court of three judges so convened.

By authority of Sections 212 and 213 of the Judicial Code, 36 Stat. 1150 (U. S. C. A., Title 28, Sec. 45a), the Interstate Commerce Commission and H. D. Pollard, as Receiver of the Central of Georgia Railway Company, intervened as defendants. The latter, as part of his answer, filed a counterclaim, praying that the appellants and their agents be enjoined from performing service to and from the tracks within Fort Benning and from using the aforementioned tariff without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity as provided by paragraph (18) of Section 1 of the Interstate Commerce Act. Appellants thereupon filed a motion to strike the counterclaim on the grounds (1) that it was not properly pleadable under Equity Rule 30, (2) that it attempted to inject into a cause adjudicable only by a three judge court an issue cognizable only by a single judge, and (3) that it prayed affirmative relief, which, if granted, would directly affect and interfere with the possession, operation, and control of the properties of which appellants were receivers, and which was therefore within the exclusive jurisdiction of the courts of their appointment.

By final decree the court below declared the order of the Commission lawful and valid and denied the appellants' prayer that its enforcement, operation and execution be enjoined. The decree further denied and overruled appellants' motion to strike the counterclaim of H. D. Pollard, as Receiver, allowed said counterclaim, and granted the injunctive relief therein prayed.

Said decree and the ruling of the Court in support thereof present a case within the jurisdiction of the Supreme Court under the statutory provisions hereinbefore cited.

(d) Cases Believed to Sustain the Jurisdiction of This Appeal.

United States v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 306;

Louisville & Nashville R. Co. v. *United States*, 238 U. S. 1;

Virginian Ry. Co. v. *United States*, 272 U. S. 658;

Baltimore & Ohio R. R. Co. v. *United States*, 277 U. S. 291;

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United States v. *Chicago, M., St. P. & P. R. Co.*, — U. S. —, Adv. Ops., 55 Sup. Ct. Rep. 462, 79 L. Ed. 492.

Respectfully submitted,

W. R. C. Cocke,
Chas. T. Abeles,
J. Randolph Anderson,
Solicitors for Appellants.

Norfolk, Virginia, July 10th, 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 295

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

SUPPLEMENTARY STATEMENT AS TO JURISDICTION.

W. R. C. COCKE,
CHAS. T. ARELLS,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 295

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA ET AL.

SUPPLEMENTARY STATEMENT AS TO JURISDICTION.

The appellants, having heretofore presented their statement as to jurisdiction and otherwise complied with the requirements of Rule 12 of the Rules of the Supreme Court with regard to such statement, and desiring to clarify their position in respect of the jurisdiction of this Court to review certain parts of the final decree of the three judge statutory court from which this appeal is taken, respectfully represent:

1. The said decree, among other provisions, granted the relief prayed in the counterclaim filed as a part of the answer of H. D. Pollard, receiver, to the bill of complaint

in the court below by perpetually enjoining and restraining the appellants and their agents from operating the track between Fort Benning Junction, Georgia, and Fort Benning, Georgia, without obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity as required by paragraphs (18), (19) and (20) of Section 1 of the Interstate Commerce Act, Part I, and from doing certain other acts and things incidental to such operation. In so decreeing the statutory court overruled the appellants' contention that the operation of said track by the appellants did not constitute an extension of the appellants' line of railroad for which a certificate of public convenience and necessity was required by paragraph (18) of Section 1 of said Act but fell within the purview of paragraph (22) thereof.

2. Although in this appeal the appellants have assigned the foregoing part of the decree of the statutory court as error, and have included such error in their statement of points to be relied upon, they are of the opinion that this Court is without jurisdiction to review on direct appeal a decree of injunctive relief which necessarily could be sought and granted only pursuant to paragraph (20) of Section 1 of the Interstate Commerce Act, Part I, but on the contrary that an appeal from such a decree must be first taken to the proper Circuit Court of Appeals.

3. Accordingly the appellants concurrently with the appeal taken to this Court also took an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from that part of the decree of the statutory court granting the injunctive relief prayed for by the counterclaim of H. D. Pollard, receiver, and said appeal remains pending in that court.

In order, however, to preserve their right to a review of such part of said decree in the event this Court rules that

it has jurisdiction of a direct appeal from that aspect of the decree of the statutory court granting injunctive relief, the appellants have deemed it necessary to submit the issue thus framed to this Court by including such issue in their assignment of errors and statement of points to be relied upon, notwithstanding that they are of the opinion, as stated, that this Court has no jurisdiction to review the question on direct appeal.

4. If this Court decides that it has jurisdiction of the question, it follows that the appeal taken to the Circuit Court of Appeals should be dismissed. If this Court decides it does not have jurisdiction it may be necessary, for the proper protection of the appellants' legal rights, to prosecute their appeal in the Circuit Court of Appeals.

5. Appellants therefore pray that, if consistent with its practice in such matters, this Court, in determining the question of its jurisdiction on other aspects of the appeal to this Court, also determine and make known its decision upon the question of jurisdiction submitted by this supplementary statement.

Respectfully submitted,

W. R. C. COCKE,
CHAS. T. ABELES,
Counsel for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 295.

LEGH R. POWELL, JR. and HENRY W. ANDERSON, as Receivers of the Properties and Assets of SEABOARD AIR LINE RAILWAY COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

Appeal from the District Court of the United States
For the Southern District of Georgia.

BRIEF FOR APPELLANTS.

W. R. C. COCKE,
CHAS. T. ABELES,
Counsel for Appellants.

Norfolk, Virginia,
December 1, 1936.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 295.

LEON R. POWELL, JR. and HENRY W. ANDERSON, as Receivers of the Properties and Assets of SEABOARD AIR LINE RAILWAY COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

Appeal from the District Court of the United States For the Southern District of Georgia.

BRIEF FOR APPELLANTS.

I.

OPINIONS BELOW.

The majority and dissenting opinions of the three-judge statutory court (*Powell, et al. v. United States*) are reported in 12 Federal Supplement 938, and have been included in the printed record at pages 327 to 342.

The report and order of the Interstate Commerce Commission challenged in this suit are published in [illegible] and have been reproduced at pages 9 to 20 of the printed record.

II

STATEMENT OF THE CASE

This suit was brought to enjoin an order of the Interstate Commerce Commission requiring to be cancelled from its files a tariff filed by appellants extending the switching limits of Fort Benning Junction, Georgia, to include designated locations within Fort Benning, Georgia. The litigation is the culmination of a series of antecedent controversies surrounding transportation service at Fort Benning. A brief history of the events leading to the issuance of the order here assailed provides a factual background against which the scope and significance of the issues may perhaps more clearly appear.

Fort Benning Junction is a station served by the Seaboard Air Line Railway and the Central of Georgia Railway, both of which are in receivership, approximately four miles southeast of Columbus, Georgia. Adjacent thereto, at a distance of approximately six miles, is situated Fort Benning, an infantry and light training camp of the United States Army located within an extensive military reservation. In 1918 a track extending from connections with the railroad lines at the junction into the reservation, was constructed by the Federal Government, and for several years thereafter this track was operated by

the military authorities. In June, 1921, the Government licensed the Central to operate into the reservation and this arrangement remained in effect until 1922 (R. 110).

In January of that year the military authorities became dissatisfied with the service rendered and the rates charged by the Central. The nature and merits of the complaints which were registered are not material here. However, after considerable negotiation and effort to reach a satisfactory understanding the military authorities revoked the license of the Central and entered into arrangements with Page & Harris who were then successfully operating a similar track at Fort Bragg, North Carolina, another military post, whereby Page & Harris were to succeed the Central as operators of the track leading into Fort Benning (R. 235). The record shows conclusively that the Seaboard took no part in these disputes and was in no sense responsible, either by inducement or suggestion, for the change in the transportation arrangements which followed (R. 115, 117).

During the Central's tenure of operation it had enjoyed a virtual monopoly of the automobile traffic moving into and out of the military reservation. The Seaboard's participation in this traffic had so diminished (R. 249) that when in 1927 the Central discontinued operations, removed the connection of the Seaboard's main line with the Fort Benning track and ceased the operations by the Seaboard (R. 266, 273). Possibly the Central foresaw in the retraction of the license and the substitution of Page & Harris in its place a threat to a continuance of its monopoly. In any event it subsequently pursued a course of action which

whether so intended or not, has harassed the operations of Page & Harris and the transportation services rendered by them to the Federal Government at Fort Benning with an almost continuous series of controversies. The disputes, involving as they do only the traffic relations between the Central and Page & Harris, are of no moment to the issues in this case except as evidence of the growing friction between the two parties which, in turn, affords a possible explanation of the persistently obstructive tactics of the Central towards Page & Harris' operation. The attitude of the Central, however, was directly responsible for the major controversies in which the Fort Benning transportation situation was embroiled for months preceding this litigation.

In ousting the Central from Fort Benning one of the primary purposes of the Government was to effect necessary economies in army transportation expenses (R. 235). With this in view the arrangements originally made for compensating Page & Harris for their services were understood to be temporary only (R. 191). It was contemplated that as soon as practicable Page & Harris would secure from the Commission authority under Section 1(18) of the Interstate Commerce Act to operate the track as a common carrier, in which status they could lawfully enter into agreements with the trunk line connections at Fort Benning Junction for divisions of the line haul rates for the services performed by them between the junction and the reservation, the revenue from this source relieving the Government of the burdensome expenditures theretofore incident to the operation of the Fort

Benning track (R. 189, 190). Accordingly, in November, 1932, the Fort Benning Railroad Company, organized for the purpose by Page & Harris and others in no way associated with the Seaboard, filed an application with the Commission under Section 1(18) for a certificate of public convenience and necessity authorizing the acquisition of the Fort Benning track and its operation in common carrier service. In this proceeding the Central intervened and opposed the granting of the application, notwithstanding which on June 18, 1933, Division 4 of the Commission issued the certificate. *Fort Benning Railroad Company Acquisition*, 193 I. C. C. 223. Shortly thereafter, however, the Commission granted a petition by the Central for reargument and reconsideration of the case, and on the following October 4th the full Commission, with four members dissenting, reversed its previous finding and order and denied the certificate. *Fort Benning Railroad Company Acquisition*, 193 I. C. C. 517. The entire record of these proceedings before the Commission which, for brevity, will be referred to as Finance Docket 9709, has been made a part of the record on appeal (R. 182 to 325).

The following excerpt from the second report issued on reconsideration of that case discloses the controlling reason assigned by the Commission for its conclusion that the certificate should be denied (193 I. C. C. 518):

> "Estimated common-carrier earnings [by the Fort Benning Railroad] of $43,000 a year are the equivalent of an average of about $15 a car for the short movement between the reservation and the junction. This revenue

would accrue from divisions of joint through rates, and, therefore, would operate as a reduction, *pro tanto*, of the Central's, or the Seaboard's revenue for the line haul.

"Since there is no community of interest between the contractors and the War Department, the instant case differs in that respect, and perhaps others, from those cases in which it has been proposed to intrude, between industries and line haul carriers, operation by separate organizations, controlled by or affiliated with the industries, of short lines to act as feeders to the trunk lines. But this fact does not differentiate the case in principle.

"We have heretofore said that independent operation of numerous short lines is not conducive to economies in transportation, that wherever possible needed transportation facilities should be furnished by existing carriers, and that this is especially true where the line proposed to be operated in interstate commerce will serve merely as a branch or feeder for an existing carrier. *Operation of Lines by C. R. & E. Ry. Co.*, 94 I. C. C. 389. See also *Tittabawassee R. Co. Proposed Construction*, 189 I. C. C. 363."

The Commission's refusal to approve the plan for effecting substantial economies to the Government in the cost of transportation service at Fort Benning created a problem of no little difficulty. Under the tentative arrangements between the military authorities and Page & Harris the latter were receiving $5.00 per car for the movement between Fort Benning Junction and the reservation, exclusive of switching within the reservation itself. This amount was in-

sufficient to permit the continuance of the arrangement then in effect (R. 138). The Government, on the other hand, under compelling pressure to reduce its transportation costs, would not pay more. Whether, and if so how, this apparent impasse could have been otherwise averted is conjectural, but at this juncture the Seaboard met the situation by publishing with the Interstate Commerce Commission, effective December 4, 1933, the tariff here involved, known as I. C. C. No. A-6826, Sixth Revised Page 139, extending the switching limits at Fort Benning Junction to include a designated receiving and delivery track within the reservation. The effect of the tariff was to afford to shippers to and from Fort Benning the rates theretofore applicable only to and from Fort Benning Junction, and thus to provide satisfactory and efficient transportation service at Fort Benning without cost to the Government other than for the intra-reservation switching beyond the designated delivery track.

In placing in operation the service undertaken by the tariff appellants did not perform the movement between Fort Benning Junction and the military post with their own crews and equipment, but instead entered into an arrangement, informal at first but later embodied in a written contract (R. 21), by which appellants employed Page & Harris to do so as their agents, paying for this service a stipulated amount per loaded car. This plan was adopted for two reasons. First, Page & Harris, with a flexible and experienced organization well adapted to the special type of service required at Fort Benning, had demonstrated their ability to perform more satisfactorily than the trunk lines, and the military

authorities therefore desired them to continue the actual operations (R. 134). Second, a thorough study by appellants of conditions surrounding the operation into Fort Benning convinced them that it would cost them more to perform the service themselves than to employ Page & Harris to do so (R. 123 to 128). The agency arrangement was therefore obviously in the interest of economy.

In thus enlarging their transportation service there was no purpose on the part of appellants either to monopolize the Fort Benning traffic or to secure more than their fair share of the movement. Any such effort, as appellants knew, would have been opposed by the military authorities whose consistent desire was to avail of the facilities of both the Seaboard and the Central. Of this attitude there is cogent evidence in the endorsement of the Assistant Secretary of War upon the contract between appellants and Page & Harris, in which his approval of the agreement was made

> "subject to the condition that Page & Harris, as Government contract operators of the Government-owned Fort Benning Railway facilities, shall ever hold themselves out as ready and willing to contract, on similar terms, with the Central of Georgia Railway and/or any other common carrier railroad." (R. 25, 26).

Page & Harris have always been prepared to comply literally with this condition (R. 97), and the Central has therefore been at liberty to place itself in a position of complete parity with appellants in respect of Fort Benning traffic. In its refusal to avail itself of this privilege there is strong implication that, under-

lying its persistent opposition to any change in transportation arrangements at Fort Benning, is the firm determination either to compel the Government to permit the Central to resume operation of the reservation track, thus restoring its former monopoly, or, if this is impossible, in any event to impose upon the Government the cost of operation from which appellants' tariff relieves it. We have pointed out above that, as between operation of the spur by either the Central, or the Seaboard, or both, and operation by Page & Harris, the latter is the logical and economical plan.

The proceeding before the Commission upon which the order herein sought to be enjoined was entered was initiated by a complaint filed by the Central of Georgia on May 1, 1934, against appellants and Page & Harris (R. 26), alleging that the tariff and the services rendered thereunder were unlawful, and asking the Commission to require the cancellation of the tariff and order the appellants, among others, to desist and refrain from asserted violations of law growing out of its use. On its face, the document, while incorporating a conventional prayer for generel relief, was primarily a charge that the tariff, and the operation thereunder, constituted a violation of paragraph (18) of Section 1 of the Interstate Commerce Act, and sought from the Commission an order requiring the Seaboard to cease and desist from such operation and violation. Proceeding upon the understanding that this was the gravamen of the complaint, appellants filed with the Commission a motion to dismiss (R. 85), asserting that the Commission was without jurisdiction to entertain the complaint

and had no power to grant the relief prayed for. This motion was renewed at the hearing and has been persistently urged upon the Commission and the lower court throughout the entire proceeding.

After due hearing and argument the Commission, under date of February 5, 1935, issued the report and order herein sought to be enjoined. While it found that, in operating the Fort Benning track without a certificate of public convenience and necessity, appellants were violating paragraph (18) of Section 1 of the Interstate Commerce Act, *it disclaimed any reliance upon that fact as ground for its ruling.* The theory upon which the order purported to proceed is stated as follows:

> "Our finding of unlawfulness of the tariff here under consideration, therefore, is not predicated on the fact that the Seaboard has violated Section 1(18), but rather on the fact that it has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier." (R. 16).

Ostensibly predicating its finding of unlawfulness solely upon this theory, the order required the tariff to be stricken from the Commission's files.

As will be later fully pointed out in the argument, the only suggestion in the report or order of a statutory proscription with which the tariff is supposed to conflict is to be found in the closing paragraph of the report where there is a general reference to Section 6 of the Interstate Commerce Act. There is, however, no specification of what provisions of this section the Commission deems to have been violated.

Immediately upon receipt of the report and order appellants filed with the Commission a petition for reargument and reconsideration (R. 37), urging that the case before the Commission had from its inception proceeded upon the theory that the Central was seeking relief for an alleged violation of paragraph (3), of Section 1 of the Interstate Commerce Act, that this ground had been assigned by the Examiner as a basis for his proposed report, and that the sole theory upon which the Commission's final report and order proceeded, namely, that the tariff was unlawful because it publishes rates to and from a station not on appellants' line and which cannot be reached by them or any other common carrier, had been treated as a subordinate question throughout and had therefore received inadequate consideration. By order dated March 4, 1935, served upon appellants on the following March 14th, the Commission, without further report, denied the petition for reargument and reconsideration (R. 39).

Thereupon on March 21st appellants filed their bill of complaint in the United States District Court for the Southern District of Georgia (the required venue), asserting that the tariff in question was lawful, that the Commission's order and the report incorporated therein were based on erroneous principles of law and exceeded the lawful powers of the Commission, and praying, among other things, for a decree perpetually enjoining the enforcement, operation and execution of the order and that it be set aside and annulled. Pursuant to the requirements of the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 220 (U. S. C. A. Title 28, Section

47) a three-judge court was convened and thereafter all proceedings below were had before, and the decree herein appealed from was made in its entirety by, the court of three judges so constituted.

By authority of Sections 212 and 213 of the Judicial Code, 36 Stat. 1150, (U. S. C. A., Title 28, Section 45a), the Interstate Commerce Commission and H. D. Pollard, as receiver of the Central of Georgia Railway Company, intervened as defendants (R. 44, 48).* As part of his answer, (R. 49) Pollard filed a counterclaim (R. 64), praying that appellants and their agents be enjoined from performing service to and from the tracks within Fort Benning and from using the tariff without obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity as provided by paragraph (18) of Section 1 of the Interstate Commerce Act, Part I. Appellants thereupon filed a motion to strike the counterclaim (R. 72) on grounds discussed in later pages of this brief.

By final decree, Judge Sibley dissenting (R. 327-344), the court below declared the order of the Commission lawful and valid and denied appellants' prayer that its enforcement, operation and execution be permanently enjoined. The decree further denied and overruled appellants' motion to strike the counterclaim of Pollard, allowed the counterclaim, and granted the injunctive relief therein sought. From the decree thus rendered this appeal is taken pursuant to the provisions of Section 238 of the Judicial Code as

*Certain shippers affected by the Commission's order also intervened in support of the bill of complaint but, an order of severance having been entered (R. 350), are not parties to the appeal.

amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, 938, (U. S. C. A., Title 28, Section 345) and the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 220 (U. S. C. A., Title 28, Section 47a).

The appeal is from the decree in its entirety although appellants are of the opinion that the part of the decree granting the injunctive relief sought by the counterclaim of intervening defendant Pollard cannot be reviewed on direct appeal, and, in a Supplementary Statement as to Jurisdiction, have so advised the court. Nevertheless, to safeguard against a possible forfeiture of their right to a review of this aspect of the case, they have deemed it essential to submit the decree of the statutory court with respect to the counterclaim as a part of this appeal and as to that aspect of the decree concurrently to take an appeal to the Circuit Court of Appeals for the Fifth Circuit, which will be prosecuted only if this court affirms the decision of the court below denying appellants' motion to strike the counterclaim and finds that the statutory court's ruling on the counterclaim is not cognizable by this court on direct appeal.

III.

THE QUESTIONS PRESENTED.

The basic questions presented by this appeal are:

(1) Should the order of the Interstate Commerce Commission dated February 5, 1935, cited above, requiring the appellants' tariff, known as I. C. C. No. A-6826, Sixth Revised Page 139, to be stricken from

the Commission's files, have been declared null and void and perpetually enjoined as without warrant in law?

(2) Should the court below, for the reasons hereinafter set forth in the assigned errors intended to be urged, have granted the motion of appellants, plaintiffs below, to strike from the answer of intervening defendant H. D. Pollard, receiver, the counterclaim seeking injunctive relief restraining appellants from operating the track between Fort Benning Junction and Fort Benning?

(3) Should the court below, having denied appellants' motion to strike, have granted the relief prayed in Pollard's counterclaim and perpetually enjoined the operation by appellants of the above described track without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity pursuant to paragraph (18) of Section 1 of the Interstate Commerce Act, or should the prayer of the counterclaim have been denied because the operation of said track does not constitute the operation of a line of railroad within the meaning of said section and paragraph but is a switching movement within the purview of paragraph (22) of said Section 1 for which such a certificate is not required by law?

IV.

ASSIGNED ERRORS INTENDED TO BE URGED.

The errors which appellants intend to urge are as follows:

1. The statutory court erred in failing to find

and decree that the order of the Commission is wholly null and void and should be perpetually enjoined for the following reasons:

(a) The tariff of the appellants which the order of the Commission requires to be stricken from the Commission's files is not unlawful for the reasons assigned by the Commission, nor is there any other lawful ground which would sustain a finding by the Commission that the tariff is in violation of Section 6 of the Interstate Commerce Act or of any other provision of law.

(b) The order condemns the appellants' tariff as a violation of Section 6 of the Interstate Commerce Act (the text of which is set out in Appendix A) without designating the provisions of that section with which it is deemed to conflict or otherwise apprising the appellants of the specific violation with which they are charged. The order therefore lacks the certainty and precision which are requisite to sustain an order of the Commission.

(c) Although the order of the Commission purports to be based upon a violation by appellants of Section 6 of the Interstate Commerce Act, the real purpose and effect of the order as clearly disclosed by the report of the Commission and by the record as a whole, are to restrain a supposed violation of paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act, the provisions of which are set forth in Appendix B. The injunctive remedy for a violation of paragraph (18) of Section 1 provided by paragraph (20) of this section is plenary and exclusive, and in attempting to enforce this paragraph indirectly by

striking appellants' tariff from its files instead of by a suit to enjoin appellants, the Commission has exceeded its power and contravened the procedural requirements of law.

(d) The Commission is without power under the Interstate Commerce Act or any other law to strike from its files a tariff theretofore filed with it and conforming in all respects to legal and administrative requirements.

2. The statutory court further erred in the following respects:

(a) In ruling that the Commission could lawfully require the tariff of the appellants to be stricken from the Commission's files to prevent a supposed violation by appellants of paragraph (18) of Section 1 of the Interstate Commerce Act.

(b) In ruling that under the Emergency Railroad Transportation Act, 1933, the Commission could lawfully require the tariff to be stricken from the Commission's files because it unduly impairs the line-haul revenue of the appellants, although the procedure requisite to the exercise of the Commission's jurisdiction under that Act had not been followed, the Commission made no finding of impairment of revenue, and there was no evidence whatsoever before the Commission or the statutory court which would support such a finding if made.

(c) In denying appellants' motion to strike the counterclaim of Intervenor H. D. Pollard, receiver, filed upon the following grounds:

(1) that said counterclaim is an attempt by an intervening defendant to assert an independent cause of action neither related nor germane to the issues raised by appellants' bill of complaint, and is not therefore a counterclaim properly pleadable within the permissible limits of Federal Equity Rule 30;

(2) that because it sought affirmative relief which, if granted, would directly affect and interfere with the possession, operation and control of the properties of which appellants are receivers, said counterclaim and the relief therein sought were matters within the exclusive jurisdiction of the courts appointing appellants receivers, and were accordingly beyond the jurisdiction of the statutory court before which this cause was tried;

(3) that the statutory court had no power or jurisdiction to entertain the counterclaim, and the filing of the bill of complaint did nor confer any such power or jurisdiction upon the court;

(4) that having been convened pursuant to the provisions of the Act of October 22, 1913, 38 Stat. 220 (U. S. C. A., Title 28, Sec. 47), the jurisdiction of the statutory court was limited to the determination of the legality of the order of the Commission sought to be enjoined by the bill of complaint in this cause, and did not extend to the consideration and adjudication of the issues raised by said counterclaim which were cognizable only by a district court consisting of a single judge and exercising the ordinary jurisdiction of a United States District Court.

(d) In that the statutory court of three judges assumed power to grant the relief prayed in said

counterclaim, as evidenced by the signatures of a majority of said statutory court to the decree granting such relief, whereas said counterclaim was cognizable only by a district court consisting of a single judge, and was therefore beyond the jurisdiction of said court of three judges.

(e) In failing to adjudge and decree that the track from Fort Benning Junction, Georgia, to Fort Benning, Georgia, is a spur, industrial or switching track within the meaning of paragraph (22) of Section 1 of the Interstate Commerce Act, the operation of which is not a line-haul service and therefore does not require a certificate of public convenience and necessity from the Interstate Commerce Commission.

(f) In allowing the counterclaim and enjoining and restraining appellants from operating the track between Fort Benning Junction and Fort Benning or using the appellants' switching tariff involved in this cause without appellants' having first obtained from the Interstate Commerce Commission a certificate of public convenience and necessity under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act.

V.

ARGUMENT.

A.

Summary of argument.

1. The order of the Interstate Commerce Commission dated February 5, 1935, requiring appellants' tariff, I. C. C. No. A-6826, Sixth Revised Page 139, to be stricken from the Commission's files should have been declared null and void and its enforcement and operation perpetually enjoined as without warrant in law for the following reasons:

(a) The Commission's report condemns the tariff as a violation of Section 6 of the Interstate Commerce Act. The theory upon which this conclusion is reached is stated variously in the report as:

> (1) "A carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be served by other common carriers through switching arrangements or otherwise."
>
> (2) "Our finding of unlawfulness of the tariff * * * is * * * predicated on the fact that it [appellants] has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier."

These propositions find no support either in Section 6 of the Interstate Commerce Act or in any other provision of law, and are directly in conflict with long established railroad practices which have been accepted and approved by the Commission and the courts.

(b) In declaring the tariff to be unlawful as in violation of Section 6 without designating the provisions of that Section with which it is deemed to conflict or otherwise apprising appellants of the specific violation of law with which they are charged the order lacks the certainty and precision which are requisite to the validity of an order of the Commission.

(c) The Court, looking through form to substance, will recognize that the real purpose and effect of the order, as clearly disclosed by the report of the Commission and by the record as a whole, are to restrain an operation by appellants which in the Commission's opinion violates paragraph (18) of Section 1. For such violation the injunctive remedy provided by paragraph (20) of Section 1 is plenary and exclusive, and in attempting to enforce this paragraph indirectly by condemning appellants' tariff the Commission has exceeded its powers and contravened the procedural requirements of law. The express disclaimer in the report that the Commission is relying upon a supposed violation of paragraph (18) of Section 1 of the Interstate Commerce Act will not preclude the Court from testing the order on the basis of the power actually exerted.

(d) The tariff was duly filed with the Commission in conformity with legal requirements and the administrative regulations of the Commission. Once so filed, there is nothing in the Interstate Commerce Act or elsewhere which permits the Commission to strike it from its files. Under Section 6 of the Act the Commission is authorized to reject the tariff for only one cause, namely, that it does not provide and give lawful notice of its effective date. The tariff

here in question is not defective in this respect and cannot therefore be stricken.

2. The decision of the statutory court expressly affirms the power of the Commission to enter the order requiring appellants' tariff to be stricken from the Commission's files on the theory that it could do so for the purpose of restraining a violation of paragraph (18) of Section 1 of the Interstate Commerce Act. This ruling is in direct conflict with the uniform decisions of this Court holding that any proceeding to enforce the violation of paragraph (18) of Section 1 must be in conformity with paragraph (20), the remedy there provided being plenary and exclusive.

3. A further reason advanced by the statutory court for sustaining the order of the Commission is "that the tariff unduly impairs the [appellants'] line-haul revenue," citing as authority for this ruling the Emergency Railroad Transportation Act, 48 Stat. 212, Section 4, Title 49, U. S. C. A., Section 254. Before the Commission may function under the provisions of this Act an order of the Coordinator of which a petition for review has been submitted to the Commission is prescribed. These procedural prerequisites have not been adopted in the instant case, and the jurisdictional basis for an order by the Commission is therefore lacking. Moreover, even if jurisdiction were present the order cannot be sustained as a proper exercise of the Commission's power to prevent undue impairment of appellants' revenue, because the Commission has made no finding of such impairment and the record before the Commission and the statutory court is devoid of evidence which would sustain such a finding if made.

4. Appellants' motion to strike the counterclaim of intervening defendant Pollard should have been sustained for the following reasons:

(a) The issues raised by the counterclaim are not germane to those of the bill of complaint and are therefore not the proper subject of a counterclaim under Equity Rule 30. Although the equity rule is broad in its language, it cannot be properly interpreted to permit a defendant to set up in a counterclaim matters constituting a cause of action wholly foreign to the subject of the bill of complaint. Here the sole question submitted to the statutory court by the bill of complaint is the validity of the Commission's order. The counterclaim, on the other hand, injects into the proceeding a controversy which need not be passed upon by the court in its adjudication of the issues presented by the bill of complaint, and therefore has no relation to the main suit. As such it does not fall within the permissible limits of Equity Rule 30.

Moreover, the counterclaimant in this suit is an intervenor and not an original defendant. As such he is not permitted by Equity Rule 30 to enlarge the field of litigation beyond the scope of the controversy as defined by the original parties.

(b) The affirmative relief sought by the counterclaim is attempted to be asserted against receivers appointed by the District Courts of the United States for the Eastern District of Virginia and the Southern District of Florida, from neither of which has authority to sue been obtained by intervening defendant Pollard. If granted it would directly affect and disturb the possession, management and control of the property

of which appellants are receivers and therefore lies only in the jurisdiction of the courts of their appointment. The statutory court is accordingly without jurisdiction to adjudicate the subject-matter of the counterclaim.

(c) The counterclaim necessarily proceeds under paragraph (20) of Section 1 of the Interstate Commerce Act authorizing injunctive relief for a violation of paragraph (18) of that Section. Such a suit must be brought before a single judge and would be appealable only to the Circuit Court of Appeals. It cannot be included in a proceeding properly heard and described only by a statutory court of three judges whose decree may be directly reviewed by this court.

5. If the counterclaim should have been stricken for the reasons stated above, whether appellants have violated Section 1(18) by operating the Fort Benning track without a certificate of public convenience and necessity is not a justiciable question on appeal, and the validity of the Commission's order must be decided without regard for the Section 1(18) aspect of the case. If this issue is to be met on its merits, however, it is manifest that the services performed by appellants between Fort Benning Junction and the military reservation are switching movements and essentially a part of a terminal or plant delivery service and not an extension of operation. As such, under rulings of the courts and of the Commission itself in analogous cases, the operation falls within the purview of paragraph (22) of Section 1 and no certificate of public convenience and necessity therefor is required.

B.

The order of the Interstate Commerce Commission requiring appellants' tariff to be stricken from the Commission's files should have been declared null and void and its enforcement and operation perpetually enjoined.

An orderly discussion of the numerous issues presented for review by this appeal is complicated by the fact that the theory upon which the Commission's order proceeds and the basis upon which the decree of the lower court rests are diverse and, in certain respects, conflicting. The Commission finds the tariff unlawful for the reasons quoted in paragraph 1(a) of the Summary of Argument,* disclaiming as ground for its conclusion its finding that appellants were violating paragraph (18) of Section 1 of the Interstate Commerce Act. The statutory court, on the other hand, disregards the principles upon which the Commission relies and reaches a decision upon wholly different and independent bases, including, curiously enough, the ground which the Commission expressly rejected. It will therefore be helpful in avoiding confusion to address our argument first to the imperfections implicit in the Commission's report and order and then proceed to an analysis and discussion of the majority opinion and the decree of the three-judge court.

1.

Appellants' Tariff violates neither Section 6 of the Interstate Commerce Act nor any other provision of Law.

Section 6 of the Interstate Commerce Act, the text of which will be found in Appendix A, prescribes

Supra, p. 19.

generally the requisite contents of and the procedure for filing and publishing tariffs, prohibits changes in published rates and charges except upon due notice, and forbids transportation by carriers subject to the Act unless tariffs covering such transportation are properly filed. In testing the Commission's order here in issue it should first be observed that all of the requirements of this section relating to the procedure for the filing of tariffs and their contents were fully complied with. Neither the order of the Commission nor any evidence of record suggests defects in this respect, and we may proceed to analyze the ground upon which the Commission's order is articulately based on the assumption that in its technical aspects the tariff is beyond criticism.

For convenience we repeat the passages from the report which purport to set forth the reasons underlying the Commission's conclusion that the tariff is unlawful:

> "A carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be served by other common carriers through switching arrangements or otherwise.
>
> "Our finding of unlawfulness of the tariff * * * is * * * predicated on the fact that it [appellants] has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier"

Underlying both of these statements are, first, the fact that appellants do not physically operate the

track with their own crews and equipment but, for reasons which will be fully explained, elect to employ Page & Harris for this purpose, and, second the Commission's finding that appellants have no legal right to occupy or operate the track. That this finding is considered vital and not merely collateral or in aid of a conclusion that would have been reached independently, is manifest from the pains the Commission has taken in its report to discount the evidence submitted to it *that full and unconditional rights to operate the track whenever they so desire had been granted appellants.*

The subject is treated in that part of the Commission's report reproduced at page 17 of the printed record. Paragraph 8 of the contract between the appellants and Page & Harris* provides as follows:

> "If, as and when the railway so desires, but subject to approval by the Secretary of War, the railway shall have the right to operate switching service with its own engines and crews over the tracks leased to and maintained by the contractors between Fort Benning Junction, Georgia, and the designated receiving and delivery track at the Fort Benning Military Post, the railway paying to the contractors a fair and reasonable compensation for the use of the contractors' facilities."

This contract was submitted in evidence at the hearing before the Commission (R. 21). Shortly after the Examiner's proposed report was issued the Secretary of War explicitly approved paragraph 8 of the con-

*See page 24 of the record.

tract by the endorsement recited in the final report of the Commission and which will be found at page 25 of the printed record.

With this ratification of the grant it might be fairly assumed that whatever bearing such right to operate the track might have upon the legality of the tariff had been fully satisfied. But when the final report appeared it contained this strange commentary on the endorsement of the Secretary of War:

> "The Seaboard contends that by this endorsement the War Department has given approval to that company to operate the Fort Benning line whenever it so desires. We do not so construe it. The endorsement was an approval of the terms of the contract, but granted no rights to the Seaboard to operate over the track in question. Manifestly the War Department could take no action on a subject matter which the Congress has placed under our exclusive jurisdiction."

That this construction of the official approval contained in paragraph 8 results from a complete misapprehension of the purpose of the parties and the legal consequences of the document itself is apparent from the plain meaning of the language. "The Endorsement," the Commission says, "was an approval of the terms of the contract, but granted no rights to the Seaboard to operate over the track in question." What words could more clearly or appropriately operate as a grant of the controverted right than: "the railway shall have the right to operate," etc., or more unequivocably satisfy the only condition of the grant than the terms in which the requisite ap-

proval was given, viz: "Approved, * * * by the Secretary of War as regards the provisions of paragraph (3) of the foregoing contract * * *."

In the light of this uncontrovertible evidence of a contractual right to operate the Fort Benning track the Commission's conclusion to the contrary, so far as it may be founded upon a construction of the contract, is plainly unwarranted.

The Commission, however, denies the efficacy of the grant to appellants of the right to operate the track not only as a matter of construction but for the further reason that "the War Department could take no action on subject matter which the Congress has placed under our exclusive jurisdiction." Obviously the Commission is referring to its finding that before the plaintiffs may operate the track a certificate under Section 1(18) is required, from which it concludes that without the certificate collateral private transactions entered into in contemplation of the operation of the track by the appellants are a nullity. In this effort to defend an untenable position there is not only confusion of thought but significant evidence that, as will be later discussed, the dominating purpose of the Commission's action in this case was to prevent what it conceived to be a violation of paragraph (18) of Section 1 of the Interstate Commerce Act.

If one purchases an automobile the title is not conditioned upon securing a license to operate, nor impaired by the failure to do so. If here appellants had leased the track from the Government the validity of the granting instrument or its efficacy, as between the parties, in conferring the leasehold interest

would not be affected by the certificate requirement of Section 1(18). The interdictions of that section are directed to the exercise of the right of operation when acquired and do not purport to control private contractual relations. For example, in entertaining an application under Section 1(18) for authority to extend a line of railroad the Commission cannot consider whether the charter of the applicant carrier authorized the proposed operation. In such a situation, this court, in *Charlotte Annapolis Ferry Co. v. U. S.*, 285 U. S. 382, 52 S. Ct. Rep. 440, 76 L. Ed. 808, said

> "Whether the railway company has corporate power to operate the proposed ferry is a question which cannot be considered in this proceeding. We think Congress never intended to impose upon the Interstate Commerce Commission the duty of determining matters of this nature before granting or withholding assent to the construction of an extension. *Cleveland, etc. Ry. v. United States*, 275 U. S. 404, 414, 48 S. Ct. 189, 72 L. Ed. 338."

Thus the conclusion is irresistible that appellants have acquired an unassailable contractual right to operate the Fort Benning track. This being the case, there is no basis in fact for the assumption, implicit in the theories upon which the Commission's order is predicated, that appellants cannot reach the point to which the tariff publishes rates. And even though the theory were sound as an abstract doctrine (which, of course, is denied) there is no room for its application in the instant case.

But even if we assume that appellants were effectually barred from entering the reservation and that the Commission was correct in its finding that Fort Benning cannot be reached by them or any other common carrier, the order declaring the tariff to be illegal cannot be sustained under Section 6 of the Interstate Commerce Act or any other provision of law of which appellants are aware. In discussing this question it should be borne in mind that the Commission has disclaimed any reliance upon Section 1(18) as ground for its order, that all implications arising from a possible violation of that section must therefore be discarded, and that the issue is confined to whether a tariff which publishes rates to and from a point not on the publishing carrier's line and which cannot be reached by it or any other common carrier is in conflict with Section 6 of the Act or any other applicable law.

What appellants have done in publishing the tariff is neither unprecedented or unusual. Stripped of technicalities, they have merely provided common carrier transportation service to a large plant located adjacent to their line. This has been common among railroads for years and until now no suggestion of illegality has attached to the practice merely because the point served is not physically located on the tracks, or the actual operation has been conducted by an agent other than a common carrier. Similar arrangements have been before the courts and have been approved. See, for example, *Vicksburg, etc., R. Co.* v. *Anderson-Tully Co.*, 256 U.S. 408, 41 S. Ct. Rep. 524, 65 L. Ed. 1020, where a trunk line carrier whose tracks terminated on the west bank of the Mississippi River published

tariffs to Vicksburg on the east bank, employing another carrier as its agents to perform the ferriage across the river and to make deliveries in Vicksburg. The rates were published as those of the trunk line, the delivery agents being compensated not through divisions but on a contract basis. The court characterized the arrangement as "equivalent to a lease of the road of the (delivering) company to the Vicksburg Company for its transportation purposes." The similarity of the two situations is apparent, and yet, though the theory of the Commission here applied would have likewise condemned the arrangement there under consideration, since Vicksburg was not physically located on the publishing carrier's line, no suggestion of its illegality is to be found in the opinion of the court. *Cf.* also *Cattle Raisers Assn.* v. *C. B. & Q. R. Co.*, 11 I. C. C. 277, 294, where delivery by carriers to off-line stockyards was recognized by the Commission as a legitimate transportation service which might be properly performed through independent agents, and *U. S.* v. *B. & O. R. Co.*, 231 U. S. 274, 34 S. Ct. Rep. 75, 58 L. Ed. 218, where this decision was approved.

The custom of extending transportation service over private tracks is one of such long standing that even though the Commission had not expressed its attitude a presumption of legality would exist. The practice, however, has received the explicit approval of the Commission in numerous cases. In *American Fuel Co.* v. *A. T. & S. F. Ry. Co.*, 123 I. C. C. 101, the Commission said (p. 112):

> "Service over private tracks or plant facility tracks by a common carrier subject to

> our jurisdiction is neither compelled nor prohibited under the Interstate Commerce Act. To furnish it or withhold it is within the discretion of the carrier. * * * Moreover, where, as here, the defendants have elected to perform the service they should publish tariffs to cover it."

To the same effect is *Winnsboro Granite Corp.* v. *Southern Ry. Co.*, 176 I. C. C. 481, 483.

For many years carriers whose rails terminate on water have extended their service by lighterage to reach important markets on the opposite side. Not infrequently the lighterage is performed not by the railroads themselves but through agents employed under contract. In the absence of discrimination or conflict with the other legal proscriptions this service to off-line points has been consistently approved by the Commission. *Federal Sugar Refining Co.* v. *B. & O. R. Co.*, 17 I. C. C. 40; *Lighterage & Storage Regulations at New York*, 35 I. C. C. 47.

Constructive or off-track stations offer a close parallel to the instant case. A constructive station is defined by the Commission as:*

> "an incorporeal point reached by motor truck and placed so as to conveniently conclude the carrier's tariff obligation, *which is made to extend beyond its rail head* * * *."

An inland station differs from a constructive station only in that it is a station in fact where all the ordinary functions of receipt, delivery and other services inci-

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Constructive and Off-Track Stations, 156 I. C. C. 205, 208.

dent to transportation are actually performed. The essential feature of both, as the italicized language above quoted indicates, is their location off the carrier's rails. Both classes of service have been long rendered by railroads, and, though the subject of exhaustive investigations by the Commission, they have never been declared unlawful merely because the points served, and to which the common carrier obligations of the railroad extend, are not located on the carrier's rails and cannot be reached by any other common carrier.* *Constructive and Off-Track Freight Stations*, 156 I. C. C. 205; *Transfer in St. Louis & East St. Louis*, 155 I. C. C. 129.

In recent years carriers are more and more frequently establishing store-door pick-up and delivery service to meet the competition of other forms of transportation. That there is nothing inherently illegal in such service, notwithstanding its extension of the carrier's obligations beyond its own rails, is plain. As the Commission has said:

> "Carriers may establish such service and collect their published charges therefor, provided no undue discrimination is practiced." *Coordination of Motor Transportation*, 182 I. C. C. 263, 367.

And in its most recent decision on this subject, approving with modifications, proposals by a large group of rail carriers to enlarge already established pick-up and delivery service, the legality of the practice was

*The usual method of reaching off-track or constructive stations is through the employment of draymen or truckmen under private contract. *Transfer in St. Louis and East St. Louis*, 155 I. C. C. 129, 131; *Pick-up and Delivery in Official Territory*, 218 I. C. C. 441, 449.

acknowledged without question, the Commission stating

> "Because of their physical limitations carriers by water and by rail have been held to be under no legal obligation to deliver freight beyond their docks and stations, but in some instances such carriers availed themselves of *their recognized right to so extend their service.*"* *Pick-up and Delivery in Official Territory*, 218 I. C. C. 111, 170.

Other instances involving service to off-line points could be cited, but these examples suffice to demonstrate how radically the theory relied on by the Commission in the present case departs from long established practices, and how completely it repudiates principles recognized and repeatedly approved by the Commission.

If the proper implication to be drawn from the Commission's statement of the ground upon which its order is based is that the tariff is unlawful because the services between the junction and the military reservation are performed by agents and not by appellants themselves, the order is equally untenable. These services, whether in fact a line-haul or a switching movement, are unquestionably public transportation. The Commission itself does not question the common carrier nature of the service if the operation constitutes an extension, and it is equally clear that if, as appellants contend, it constitutes a switching movement it is likewise transportation which appellants are entitled and, under the tariff, are required to provide as a common carrier. In *American Sheet & Tin*

*Emphasis ours.

Plate Co. v. United States, 15 Fed. Supp. 711, a recent decision of the District Court for the Western District of Pennsylvania, the court said (p. 713):

> "However, it is certain that 'spotting service' is 'transportation' * * *, and therefore a common-carrier service up to certain limits, and includes the placement of cars in position accessible to consignors and consignees respectively for loading and unloading. By long continued custom and practice, such placements are made both on the carriers' tracks within their established terminals and on their own right-of-way, and also on private industrial tracks off the carrier's right-of-way on the private property of the industry served.
>
> "We therefore reach the conclusion that 'spotting services' are recognized in law as common-carrier service to which the shippers are entitled and which the carriers are in duty bound to perform."

If, then, appellants proposed to operate over the track with their own crews and equipment they would be legally free, apart from the possible interdiction of Section 1(3), to undertake and perform the service by simply complying with tariff requirements. The Commission's report apparently holds that because they have found it expedient for reasons heretofore explained * to operate the track through an agent who is the lessee of the property and licensed by the owner to operate it, the service legally rendered thereby becomes unlawful when vicariously performed.

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* Supra, p. 7.

For this principle there is no support in law, or, we submit, in reason. On the contrary it is firmly established that a common carrier may hire facilities and employ an agent to perform any service which it might itself undertake. Prior to the passage of the Act to Regulate Commerce this court in the *Express Cases*, 117 U. S. 1, 23, 6 S. Ct. 542, 551, 29 L. Ed. 791, 801, said

> "The railroad company performs its whole duty to the public * * * when it affords * * * all reasonable accommodations. If this is done the railroad company owes no duty to the public *as to the particular agencies it shall select for the purpose*."*

This common law principle has not been modified by the Act. In *I. C. C. v. Diffenbaugh*, 222 U. S. 42, 32 S. Ct. 22, 56 L. Ed. 83, decided after the Act was passed, the court stated:

> "*There is nothing in the Act [to regulate commerce] to prevent a carrier from hiring the instrumentality [of transportation] instead of owning it.*"*

And later, in *U. S. v. B. & O. R. Co.*, 231 U. S. 274, 34 S. Ct. Rep. 75, 58 L. Ed. 218, an agency arrangement for the performance of a transportation service was considered without suggestion of disapproval.

Moreover, the Commission long ago recognized the right of a carrier to employ and compensate an agent for the performance of a part of its transportation services. The legality of such an arrangement was

*Emphasis ours.

an issue in *A. T. & S. F. Ry. Co. v. Kansas City Stock yards Co.*, 331 I. C. C. 92, and was approved in language particularly apt in connection with the question here presented. At page 98 of that report the Commission said:

> "Railroads are not required to own all of the instrumentalities required for the performance of the service which they are bound or undertake to perform. They may also lease or hire suitable facilities or discharge a part of their duties through agents and without restriction as to the public or private status of such agents or of the owners of the instrumentalities procured."

The same view has been expressed in *In re Allowances to Elevators by Union Pac. R. Co.*, 12 I. C. C. 47; *Edge Moor Iron Company v. Director General*, 81 I. C. C. 537, and many other cases.

This long accepted principle has been recently affirmed in *American Sheet & Tin Plate Co. et al.* Referring to the operating services which were one subject of the Commission's order enforced in that case the court said (p. 714):

> "It is also certain that the carriers may either do this operating service themselves or engage others, including shippers and owners of property transported, to do it."

It is accordingly so firmly established that a carrier may perform part of its services through an agent that the matter would scarcely have warranted even brief allusion but for the possible implication which could be drawn from that part of the Commission's

report which holds that a carrier has no right to include within the switching districts tracks over which the carrier has no right to operate as a common carrier, or which cannot be served by other common carriers through switching arrangements or otherwise. If this statement is intended to mean that the service is unlawful because appellants do not *own* the facilities affording entry into the reservation and have therefore found it expedient to operate the track through an agent already licensed to do so, it is manifestly in conflict with the judicial and administrative approval of such arrangements in the past. On the other hand, if it is intended to condemn what appellants have done merely because the agent employed is not a common carrier the position of the Commission cannot be supported in law or in reason, and is diametrically opposed to the views expressed in its decision in *A. T. & S. F. Ry. Co. v. Kansas City Stockyards Co.*, quoted above.

Since then, the order of the Commission cannot soundly rest upon the illegality of the agency arrangement or the status, as private carriers, of Page & Harris, and cannot be sustained merely because the tariff publishes rates to a point not physically located on appellants line, there is no perceptible ground upon which the tariff conflicts with Section 6 of the Act.

2.

The Order lacks the certainty and precision requisite to the validity of an Order of the Commission.

Section 6 of the Act, set forth in Appendix A, prescribes with such particularity the duties of the carriers and the powers of the Commission with respect

to the form and content of tariffs that it may be fairly said that no part of the encyclopaedic code of railroad regulations contained in the Interstate Commerce Act has been drafted with more meticulous regard for detail and less resort to generality. It might therefore have been reasonably expected that in ascribing the illegality of the tariff to a supposed conflict with this section the Commission would have given some indication of the specific requirements of the section to which, in its opinion, the tariff fails to conform. Instead, the only mention of a statutory violation is found in the closing paragraph of the report where it is said in the most general possible terms to violate Section 6.

This section, embracing thirteen paragraphs and many more subparagraphs, deals with a number and variety of subjects. A general reference to it is scarcely more informative of the specific offense with which appellants are charged than would be a statement that they are violating the myriad provisions of the Interstate Commerce Act itself. If the tariff is unlawful it should be withdrawn, but before compelling its cancellation it is the duty of the Commission to apprise appellants of the reason for its opinion in some clearer and more definite form than by general reference to a part of the Interstate Commerce Act so broad in scope as to defy identification of the particular provisions which the Commission deems to have been violated. Such an order utterly fails to conform to the standard laid down by this court in *Beaumont, S. L. & W. Ry. Co.* v. *U. S.*, 282 U. S. 74, 51 S. Ct. 1, 75 L. Ed. 221, where it was said:

> "Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this. *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 58, 43 S. Ct. 51, 67 L. Ed. 124."

And in its recent decision in *U. S.* v. *Chicago, M. St. P. & P. R. R. Co.*, 294 U. S. 499, 55 S. Ct. Rep. 462, 79 L. Ed. 1023, this court condemned for uncertainty an order of the Commission suspending coal tariffs in the following language:

> "The difficulty is that it [the Commission] has not [stated its findings] with simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-judicial findings of an administrative agency."

The vice of the order here under attack could not be more aptly described.

In this connection appellants throughout the proceeding before the Commission and the lower court repeatedly sought some tangible expression of the precise ground for attacking the tariff. At the very outset of the hearing they requested that the Central's complaint be clarified (R. 92), and on briefs and oral argument they protested the vagueness and ambiguity which pervaded the defendant's presentation and the proposed report of the Examiner. Yet the final report and order are quite as uncertain

and ambiguous and still leave unanswered the inquiry: *What law does the tariff offend and why?* Until this question is answered the order should not receive judicial approval.

3.

The Order is in reality an effort by the Commission to restrain a supposed violation of Section 1(18) of the Interstate Commerce Act, and, tested by its purpose and effect, is beyond the Commission's power.

From the very inception of the proceeding before the Commission appellants have persistently maintained that its underlying purpose was to restrain a supposed violation of paragraph (18) of Section 1 of the Interstate Commerce Act, and accordingly sought relief which the Commission was without power to grant. A motion to dismiss the complaint on this ground was presented to the Commission at the outset (R. 85), the contention was made one of the averments of the bill of complaint below (R. 5), and the point was vigorously pressed in brief and argument before the Commission and the lower court.

The part played by the Central of Georgia in the earlier proceeding before the Commission (Finance Docket 9709) in which it opposed the application of the Fort Benning Railroad for a certificate under Section 1(18) to operate the Fort Benning track as a common carrier* is significant of its attitude and purpose in filing the complaint which resulted in the order here under attack. In that case the necessity of a certificate for the service between the junction

*Appellants were not parties to the proceeding in Finance Docket 9709.

and the military reservation was not questioned and hence, except by implication, not decided. But having persuaded the Commission to deny the application on the assumption that the proposal there under consideration was within the purview of Section 1(18), the Central manifestly believed that it could invoke the aid of the Commission, acting in its administrative capacity, to circumvent any common carrier operation of the Fort Benning track without the Commission's authority.

The record plainly reveals that this was the Central's dominating purpose in initiating the proceeding known as Docket 26483. Paragraph 13 of the Central's complaint (R. 34) specifies four grounds upon which the tariff is charged with illegality. Of the four, two are based upon the alleged violation of Section 1(18). The remaining two, viz.: that the tariff is obscure and fails to state the charges absorbed by appellants, and that, though in terms it covers "reciprocal switching" there are no reciprocal arrangements involved, were so obviously trivial and without substance that they were not even adverted to during the subsequent stages of the proceeding and must be considered to have been abandoned.

Of the five prayers of the complaint (R. 35) two are directly based upon the supposed violation of Section 1(18). The other three, asking for cancellation of the tariff, for an investigation by the Commission and for general relief, assign no specific ground upon which the tariff is believed to violate the law.

Throughout the hearing and on briefs and oral argument the Central consistently stressed the charge

that the tariff and the services rendered under it were in conflict with Section 1(18) and constituted an evasion of the Commission's order denying a certificate to the Fort Benning Railroad (193 I. C. C. 517). Despite the urgent insistence of the plaintiffs at the very outset of the hearing before the Commission that the generalities of the complaint be clarified so that they would be apprised of any ground for relief, other than the claimed violation of Section 1(18), upon which the complainant might rely (R. 92), the record is barren of any other tangible assignment of illegality. From the form of the complaint and the exclusive emphasis placed upon the Section 1(18) feature of the case in the course of the hearing the inference is therefore compelling that the proceeding before the Commission was conceived and prosecuted throughout for the sole purpose of restraining a violation of Section 1(18).

It is likewise plain that the order of the Commission, responsive to the gravamen of the complaint, was predicated upon the supposed illegality of appellants' operation without a certificate and that, though ostensibly the Commission's action is attributed to the illegality of the tariff, in fact its essential purpose was to restrain what the Commission conceived to be a violation of Section 1(18). The finding of such violation is of itself strongly persuasive of the basic motive of the order, for otherwise that finding would be wholly irrelevant. That it was made is therefore compatible only with the conclusion that it was considered an important factor contributing to the result. The bare assertion that the order proceeds on other grounds cannot overcome the evidence of the record

itself, nor preclude the court from testing the order on the basis of the power actually exerted. The duty of the court in these circumstances has been stated in *Southern Pac. Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283:

> "although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority [possessed by the Commission], yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power."

Looking, then, to the substance and ignoring the form of the order, it is manifestly an attempt by the Commission to enforce the provisions of Section 1(18). That, as such, it exceeds the Commission's power will be demonstrated in that part of the brief addressed to the ruling of the statutory court affirming the authority of the Commission to declare the tariff unlawful for that reason.*

4.

The tariff having been filed with the Commission in conformity with legal requirements and administrative regulations, the Commission is without power to strike it from its files.

It is to be observed that the order requires only that the tariff be stricken from the Commission's files.

Ante, pp. 45 to 55.

In this there is a defect of form and substance. Section 6 of the Interstate Commerce Act prescribes the requisite contents of and the procedure for filing and publishing tariffs. Admittedly these requirements were fully complied with by appellants with respect to the tariff here involved, and accordingly it became, and unless subverted by the order, has continued to be a lawfully filed tariff. Whatever power the Commission may otherwise possess to require the annulment of a tariff which it deems unlawful, there is nothing in the provisions of Section 6 of the Interstate Commerce Act or elsewhere which permits it by order to strike a tariff, once published with it, from its files, nor which lends to such an order any effectiveness whatsoever in impairing the legality of the service rendered pursuant to the tariff. On the contrary, the Commission is authorized to reject a tariff for one cause and one cause only, namely, that "it does not provide and give lawful notice of its effective date."*. This specific authority strongly implies that it cannot employ the device for any other reason. Its action here is therefore anomalous and abortive.

C.

The statutory court erroneously held that the order can be sustained as a proper means of restraining a violation of Section 1(18).

We have previously noted the diversity between the grounds assigned by the Commission as the basis for its order and the theories upon which it is sustained

*Section 6(9).

by the court below.* Proceeding on the principle that in testing the validity of the order it is not confined to the reasons stated by the Commission (*Southern Pacific Co.* v. *Interstate Commerce Commission*, 200 U. S. 536, 26 S. Ct. 330, 50 L. Ed. 585) the first ground advanced by the court is stated as follows (12 Fed. Supp. 941):

> "Apparently the only reason that the Commission did not declare as a basis for its order the fact that the Seaboard was in fact, though not in name, operating a railroad without having first obtained a certificate of public convenience and necessity was because it was misled as to the meaning of Section 1(20), 49 U. S. C. A. Sec. 1(20), of the Interstate Commerce Act. It is true that such section provides: 'Any construction, operation, or abandonment contrary to the provisions of this paragraph * * * may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any Commission or regulating body of the State or States affected, or any party in interest.' It is also true that no party in interest can initiate a proceeding before the Commission to have it in form or substance enjoin the operating of a railroad in violation of Section 1(18) of the Act, 49 U. S. C. A. Section 1(18). *Texas & Pac. R. Co.* v. *Gulf, etc., R. Co.*, 270 U. S. 266, 46 S. Ct. 263, 264, 70 L. Ed. 578; but 'if application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph 20 affords him the only remedy.' Id. In the instant case the Central had the right to intervene and did so.

Supra, p. 24.

> "It must be borne in mind that there was no urge that the Commission enjoin the violation of Section 1(18), 49 U. S. C. A. Section 1(18), but merely that the tariff be cancelled. Uncancelled, it apparently panoplies the Seaboard against attack in courts for violation of Section 1(18). Surely the Commission must have authority after declining the issuance of a certificate of convenience and necessity to prevent the continuance of the use of its files and its apparent approval of a scheme to defeat its formal decision. No one contends that the Commission can enjoin the Seaboard from either directly or indirectly violating Section 1(18), any more than it could punish it criminally. But it can hardly be contended that the Commission must unwillingly acquiesce in fortifying a scheme it disapproves."

If we understand correctly the position adopted by the court on this phase of the case it concedes that the Commission cannot by direct administrative action compel appellants to refrain from violating paragraph (18) of Section 1, but maintains that it can effectually accomplish the same result indirectly by nullifying the tariff and thus exposing appellants to the charge of operating without a duly filed tariff in violation of paragraph (7) of Section 6 of the Act.* This conclusion, we submit, is squarely in conflict with paragraphs (18) to (20) of Section 1 of the Act as construed and applied by this court.

In discussing the issue thus presented it will be helpful to examine the basis for the admission by the court that the Commission cannot "enjoin the

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*Appendix A, p. 102.

Seaboard from either directly or indirectly violating Section 1(18)." Prior to the Transportation Act, 1920, railroad common carriers were free to construct new, or abandon existing, lines and to undertake or discontinue operations as they chose. By that Act the policy of carrier regulation, theretofore mainly confined to the prevention of abuses, was broadened to insure adequate transportation service. *Akron, C. & Y. R. Co. v. U. S.*, 261 U. S. 184, 189, 43 S. Ct. 270, 273, 67 L. Ed. 605, 609, (*The New England Divisions Cases*). Among the measures adopted for this purpose were the provisions of paragraphs (18) to (22) of Section 1, whereby carriers were deprived of untrammeled discretion with respect to extensions and abandonments of line or operation, and authority was conferred upon the Commission to determine as a matter of administrative judgment whether, in each instance, proposed extensions or abandonments were compatible with public convenience and necessity. Congress did not stop, however, at the bare prohibition of these acts without the Commission's consent, but proceeded in comprehensive terms to prescribe penalties for violations and more important to the question here involved to provide in paragraph (20) specific procedure, confined solely to injunctive relief in the Courts, to restrain any extension or abandonment contrary to the provisions of the Act.

In *Texas & Pac. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 46 S. Ct. 263, 70 L. Ed. 578, this court had occasion for the first time to define the nature and extent of the jurisdiction conferred upon the Commission by paragraphs (18) to (22). The G. C. & S. F proposed to construct certain trackage connecting its

main line with an industrial area in Dallas, Texas already served by the Texas & Pacific. Maintaining that the proposed tracks would constitute an extension within the meaning of paragraph (18), the Texas & Pacific filed its bill to enjoin the construction on the ground that no certificate had first been secured from the Commission. The G. C. & S. F. challenged the jurisdiction of the court on grounds next stated, in the following language of the opinion, 275 U. S. 272, 70 L. Ed. 581, 46 S. Ct. 264,

> "It is argued that the new tracks constitute an extension presents an administrative question, that the Commission has power to decide it, because Congress by necessary authority to determine whether an extension is compatible with the public interest has by implication conferred authority to determine also the subordinate question whether a proposed track constitutes an extension; that if the Commission finds the track to be an extension, it may under its general powers make an order requiring the carrier to cease the same from construction and operation as one not within the prescribed certificate in force; and that as the Commission has such primary jurisdiction, its aid must be invoked before a court can grant relief."*

On this contention the Court ruled:

> "To this argument the provisions of the Act afford a conclusive answer. Paragraph (18) prohibits construction of an extension without obtaining the certificate. Paragraphs (19) and (20) provide that a carrier desiring to construct

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*Emphasis ours.

> one may apply for the certificate and prescribe the method of proceeding. Whenever such an application is made, the Commission may pass incidentally upon whether what is called an extension is in fact such; for if it proves to be only an industrial track, the Commission must decline, on that ground, to issue a certificate. A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track. *But a party in interest who is opposed to the construction is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If the application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph (20) affords him the only remedy. That remedy is both affirmative and complete.*"*

Again, in *St. Louis S. W. R. Co.* v. *Missouri Pac. R. Co.*, 289 U. S. 76, 53 Sup. Ct. 516, 77 L. Ed. 1042, this court, commenting on Section 1(18), said:—

> "Transportation Act, 1920, which confers upon an interested carrier the right not to be subjected to * * * new competition unless it is found to be in the public interest, prescribes the remedy for the protection of that right. The remedy prescribed is a proceeding to enjoin. Paragraph 20 of Section 1 declares that 'any construction or operation' contrary to the provisions of paragraphs 18, 19 or 20 'may be enjoined by any court of competent

*Emphasis ours.

> jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest.' That procedure affords an opportunity 'to secure an orderly hearing and proper determination of the matter.' *Western P. C. R. Co.* v. *Southern P. Co.*, 284 U. S. 47, 52, 76 L. Ed. 160, 163, 52 S. Ct. 56; and the remedy is 'both affirmative and complete' ", *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 273, 70 L. Ed. 578, 582, 46 S. Ct. 263.

The principle of these decisions has been recognized and applied by the Commission itself. In *Hild* v. *Chicago, N. S. & M. R. Co.*, 150 I. C. C. 367, a committee of security holders filed a complaint under Section 13(1) of the Act alleging that the railway company had issued securities without first obtaining the authority required by Section 20a. The Commission was asked to investigate the matter and to decide whether it had jurisdiction over the issue in question. A hearing was held, following which the Commission dismissed the complaint for lack of jurisdiction, relying, as will be noted from the following portion of the report, upon the *Texas & Pacific Case:*

> "While we have already investigated the complaint and have developed a record in the proceeding, we do not feel, for the reasons stated, that we should make any findings of fact, or state any conclusions, or render any decision as to the application of Section 20a to the issue of securities by defendant. *Under the opinion of the court in Texas & Pac. Ry.* v. *Gulf, etc., Ry., 270 U. S. 266, it is doubtful*

*whether we have jurisdiction to entertain the Complaint, notwithstanding the provisions of Section 13.** In that case suit was brought under paragraph (20) of Section 402 of the transportation Act, 1920, against the Gulf, Colorado & Santa Fe Railway Company to enjoin the construction of railway tracks as constituting an extension for which a certificate of public convenience and necessity must first be obtained from us under paragraph (18) of that section, inserted as paragraph (18), Section 1, of the Interstate Commerce Act. By answer defendant in that case challenged the jurisdiction of the court, insisting that the line was a mere industrial track within the exceptions of paragraph (22). In disposing of this contention the court says:

(Here follow the quotations from the decision in the *Texas & Pacific Case* set out above.)

"The same reasoning applies here. *R. R. Com.* v. *Southern Pac. Co.*, 264 U. S. 331, 347. Paragraph (2) of Section 20a makes it unlawful for any carrier within the meaning of that term as used in the section to issue any securities unless and until upon application by the carrier and after investigation by us we authorize such issue by our order. Paragraph (4) provides that applications for authority to issue securities shall be in such form and contain such matters as we may prescribe, and shall be signed, verified, and filed as herein required, paragraph (6) relates to procedure upon such applications, and paragraph (3) confers upon us certain powers with respect to the dispositions of such applications. When an application is made under Section 20a we may pass incidentally upon the question whether the applicant

*Emphasis ours.

> is a carrier within the definition of that term as used in the section. A carrier desiring to issue securities, by making application to us, does not necessarily admit that it is such a carrier. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion our order authorizing the issue of securities as proposed is not required because it is not a carrier subject to the provisions of Section 20a. But a party in interest who is opposed to the issue of securities as proposed is not authorized by the Act to initiate before us any proceeding concerning such issue. If application for an order authorizing an issue of securities is made, and a hearing is had, he may appear there in opposition. If no such application has been made, paragraph (11) affords him the only remedy. That remedy is affirmative and complete.
>
> "For the reasons stated we are of the opinion that we should not entertain the complaint."

By these decisions it is settled beyond possibility of dispute that the sole remedy for a violation of paragraph (18) of Section 1 is the injunctive relief provided by paragraph (20), and that accordingly the Commission is without jurisdiction, in an administrative proceeding before it, to enforce the act or to restrain or punish its violation.

The decision of the court below, as previously stated, concedes the force and conclusive effect of the decisions cited in denying to the Commission, acting in its administrative capacity, the power to restrain an operation deemed to be contrary to the provisions

of Section 1(18). It then proceeds, however, to hold that though the statutory infringement cannot be reached directly, yet if the approach of the Commission is through its tariff regulating powers the supposedly unlawful operation can be prohibited by a cancellation of the applicable tariff as effectively as though the Commission had plenary authority to enforce the Act by administrative order. The court, in other words, affirms in the Commission the right to reach obliquely an objective which it cannot attain directly.

With deference to the views of the lower court, we submit that this employs form to destroy substance. As already observed, paragraphs (18) to (22) of Section 1 added to the Interstate Commerce Act a new subject of regulation, completely self-contained. These paragraphs embraced not only the restrictive provisions but likewise the machinery for compliance and the remedy and punishment for violation. The remedial and enforcement provisions, this court has said, are plenary and exclusive, leaving no room for administrative action by the Commission. The lower court would nevertheless permit the Commission's general power to regulate tariffs to be utilized as an alternative procedure to restrain violations of paragraph (18). This ruling, we submit, is utterly incompatible with the form of relief specifically prescribed by paragraph (20,) and the judicial forum provided for its enforcement.

To this contention, which was vigorously urged upon the statutory court, the opinion replies that unless the Commission can cancel the tariff appellants are immune to attack for a violation of Section 1(18), and that the Commission has the authority "to pre-

vent the continuance of the use of its files and its apparent approval of a scheme to defeat its formal decision."* The court's apprehension is manifestly unfounded. A test of the appellants' operation of the track is available to the Commission or any party in interest, but it must be had in the manner prescribed by paragraph (20). The injunctive remedy there provided affords full opportunity to the Commission to challenge appellants' action and to purge its files of the tariff if the proper court, in a proper form of action, sustains its contention that the operation is unlawful without a certificate.

D.

The statutory court erred in holding that the order of the Commission was a valid exercise of the Commission's power to prevent impairment of appellants' revenue under the Emergency Railroad Transportation Act.

In sustaining the Commission's order the statutory court assigned an additional ground for its validity, stated by the court as follows (R. 333, 334):

> "Another sufficient reason for sustaining the order, and disclosed in the report of the Commission, is that the tariff unduly impairs the line haul revenue. This is authorized under the Emergency Railroad Transportation Act, 48 Stat. 212, Sec. 4 (49 U. S. C. A. Sec. 254): 'The purposes of this Title are (1) to

*While the assertion that Appellants were attempting to defeat the Commission's order in Finance Docket 9709 has no proper place in the subject under discussion it is appropriate to point out that since the operation of the Fort Benning track is not in appellants' view subject to the Commission's jurisdiction under Section 1 18 , their action in filing the tariff was entirely consistent with their legal rights.

> encourage and promote or require action on the part of the carriers and of subsidiaries subject to the Interstate Commerce Act, as amended which will * * *, (b) control allowances, accessorial services and the charges therefor, and other practices affecting service or operation, to the end that undue impairment of net earnings may be prevented, and (c) avoid other wastes and preventable expense.
>
> "See *New England Divisions Case*, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605; *Dayton Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 468, 44 S. Ct. 169, 68 L. Ed. 388, 33 A. L. R. 472; *Wallower v. United States* (D. C.), 32 F. (2d) 524, wherein on page 527 in graphic language it is declared that the Commission has power to 'prevent a carrier from cutting its own throat.'"

In thus relying upon the Emergency Railroad Transportation Act (49 U. S. C. A., Secs. 250-268)* the court, in our view, overlooks two vital considerations, the first procedural, the second substantive.

The purposes of the Emergency Railroad Transportation Act are defined in Section 4 and it is unnecessary to enumerate them further than by reference to those parts of that section quoted in the foregoing excerpt from the court's opinion. But the plan and procedure for effectuating these purposes explicitly designated by the Act have an important bearing upon this aspect of the decision.

Section 2 of the Act (U. S. C. A., Title 49, Sec.

*The text of Title I of this act is set forth in Appendix C. The provisions of Title II are inapposite.

252, creates the office of Federal Coordinator of Transportation. Section 2 divides carriers into three groups and provides for each a regional coordinating committee. Section 4 as stated sets forth the purposes of the Act. The following sections direct the regional committees on their own initiative to carry out the designated purposes through voluntary action of the carriers failing which they shall recommend to the Coordinator the action they propose. The areas in them authorized to issue and enforce orders are limited to such orders as be found to be necessary in the public interest and in furtherance of the purposes of the Act. Section 5 provides a review by the Interstate Commerce Commission of any order so issued with appropriate requirements for notice and hearing and authorizes the Commission after such review to modify or order [illegible] to modify the order [illegible] to comply with any order of the Coordinator or the Commission. Sec. 12 and 13 [illegible] may be invoked in the same manner as [illegible] of the Commission made under the Interstate Commerce Act (Sec. 16).

[illegible] this brief synopsis of the Act it will be seen that in order of the Interstate Commerce Commission to exercise the powers delegated to it by the Emergency Railroad Transportation Act [illegible] proceeding which has been instituted by it [illegible] manner provided by the Act itself. The situation in the Commission may be stated thus: An order of the Commission [illegible] a carrier [illegible] a petition pursuant to Section 5 [illegible] the order assailed. Such a petition presupposes some final action taken by a regional committee. The determination of both from which an order of the Co-

ordinator has emerged. In the absence of such an order there is manifestly nothing to be reviewed and accordingly nothing upon which the Commission can act.

In the instant case the preliminary procedure essential to an order of the Commission sustainable under the Emergency Railroad Transportation Act is wholly lacking. There was neither a recommendation by a regional committee nor an order by the Coordinator, and, of course, no petition to the Commission seeking a review under Section 9 of the Act. The order of the Commission here before the court did not profess to be issued in pursuance of the authity delegated by the Act, or as a step in the administrative process there set up. The procedural prerequisites for effective action by the Commission under the Act are therefore wholly lacking.

The decision of a three-judge court sitting in the Northern District of Illinois in *Louisville & N. R. Co.* v. *United States*, 10 Fed. Supp. 185, is recent support for this view. There the Coordinator had ordered the discontinuance of a newly established interchange of through passenger equipment between connecting rail carriers. The lines affected applied to the district court for an injunction to restrain the order without first seeking a review by the Commission under Section 9 of the Act. One of the questions raised was whether the plaintiff might seek equitable relief without having exhausted its remedies before the Commission. The court held that since the administrative process provided by the statue had not been completed the controversy had not reached a justiciable stage, and denied the application. The

decision, it is true, deals with the jurisdiction of a court of equity to entertain a proceeding arising under the Act before its procedural requirements have been met, but, in its insistence upon strict adherence to the administrative prerequisites of the Act, affirms by analogy the principle which, we submit, is conclusive of the point here under discussion. For if the jurisdiction of a court of equity cannot be invoked until the remedial provisions of the Act have been exhausted, *a fortiori* no action of the Commission may be approved as an exercise of an authority derived from the Act until the preliminary steps indispensable to the creation of jurisdiction in the Commission have been taken. It is therefore inconceivable that the statutory court's reliance upon the Act as a basis for sustaining the order here in question can be sustained.

Even though we disregard the jurisdictional aspect, however, the lower court's resort to the Emergency Railroad Transportation Act as a basis for its approval of the Commission's order is in error for a further and equally conclusive reason. Granting, *arguendo*, that the Commission has the power, whether derived from this Act or some other statutory source, to prevent appellants from unduly impairing their revenue, it cannot do so unless it first finds, upon sufficient evidence before it, that what appellants have done in fact unduly impairs their earnings. *Florida* v. *United States*, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291. The report of the Commission is without suggestion of such a finding, and the record is barren of evidence which, had it been made, would support it.

While the failure of the Commission to make a finding of an essential basic fact is in itself a sufficient answer to this aspect of the lower court's ruling a brief review of certain parts of the record will serve to demonstrate the confusion which induced the conclusion reached by the court. In the proceeding before the Commission in Finance Docket 9709, in which the Fort Benning Railroad applied for a certificate to operate the Fort Benning track as a common carrier, the Commission's report recited evidence adduced by the applicant of the annual revenue which would be derived from the proposed operation. The passage referred to states (R. 230):

> "The applicant's [Fort Benning Railroad's] revenues are estimated at $55,000 a year. * * * * This revenue would accrue from divisions of joint through rates, and, therefore, would operate as a reduction, *pro tanto*, of the Central's or the Seaboard's revenue for the line haul."

And further (R. 231):

> "Here the applicant and its sponsors would be the sole beneficiary of such practices, and at the expense of established carriers whose properties are in receivership."

In its opinion in the instant case the lower court included these statements in its findings of fact (R. 337), and upon them necessarily based its conclusion that appellants' tariff impaired their revenue and that the Commission's order could be sustained on that ground. In so doing it ignored or overlooked the fact that the Seaboard and its Receivers were not

[illegible] the Fort Benning track in the [illegible] arrangement [illegible] the terms and conditions surrounding the operation [illegible] because they are material to the question under discussion but because, in showing the [illegible] between appellants and Page & Harris for performing the services [illegible] undertaken by the tariff in issue in this case differ fundamentally from those prevailed in Docket [illegible] 9791 and that accordingly although the general findings of the Commission in that proceeding [illegible] have the findings of the Commission in this case have no probative value in the proceeding and offer no support for the carrier's finding of reasonableness of revenue.

The contract between appellants and Page & Harris was introduced in evidence as [illegible] and sets forth the terms upon which appellants employed Page & Harris as their agents to conduct the service between the junction and the [illegible] station. The agreement provides that Page & Harris will receive $12.50 for each loaded car transported by them unless appellants' gross revenue is less than $25.00 in which event Page & Harris' compensation will be not exceeding 50% of such revenue. The record explains fully that the arrangement was satisfactory to appellants because they could conduct the switching service through the agency of Page & Harris at less expense than by the use of their own crews and equipment, and was therefore in the interest of economy (R. 115). These facts are pertinent not because they are material to the question under discussion but because, in showing the [illegible]

The record shows that the average [illegible] over a ten period [illegible] was $12.50 (R. 14).

before the Commission, they emphasize the confusion underlying the court's finding on this subject, and conclusively confirm the assertion in Judge Sibley's dissenting opinion that:

> "The putting in evidence of the former proceedings in which Page & Harris were denied a certificate of public convenience and necessity (Finance Docket 9709) did not make the findings in that case findings in this one." (R. 339).

The test of the court's ruling, from the evidential standpoint, however, must in the final analysis rest upon whether there is any substantial factual basis to support a finding that the tariff results in undue impairment of appellants' revenue. On this question all that the record shows is that by publishing the tariff appellants have enlarged the service provided for the public to include the switching of cars to and from the military reservation, whereas formerly their undertaking terminated at Fort Benning Junction. *Had they elected to operate between the junction and the reservation with their own crews and equipment the fact that they made no additional charge for the switching movement would not have been evidence of undue impairment of revenue unless it were shown that the revenue received by them for the entire haul was not sufficient to compensate them for the cost of the service, and upon this point the record is utterly silent.* Instead of operating their own crews and equipment they are employing an agency the use of which effects a demonstrated economy. If the operation of the service by appellants themselves is not, without more, evidence that the service rendered under the tariff is not remunerative,

it is obvious that an arrangement which in fact costs them less can not be validly criticised on that score.

Since, therefore, the jurisdictional basis for action by the Commission under the Emergency Railroad Transportation Act is wholly lacking, and there is neither an essential finding by the Commission of undue impairment of appellants' revenue, nor evidence to support such a finding if made, the conclusion is irresistible that the lower court was in error in approving the Commission's order as a proper exercise of its authority under the Emergency Act.

E.

Appellants' motion to strike the counterclaim of intervening defendant Pollard should have been sustained.

We have previously described the counterclaim filed as a part of the answer of intervening defendant Pollard seeking to restrain appellants' operation of the Fort Benning track without first obtaining a certificate from the Commission (R. 64), and the effort of appellants, by motion to strike pursuant to Equity Rule 33, to remove this issue from the case (R. 72). By the decree of the court below the motion was denied, the counterclaim was allowed, and the injunctive relief sought was granted (R. 342). Appellants maintain that the motion to strike should have been granted for the following reasons:

(1) The counterclaim involves issues which are not germane to those of the bill of complaint and are therefore not the proper subject of a counterclaim under Equity Rule 30.

(2) The counterclaim seeks affirmative relief which, if granted, would directly affect and disturb the possession, management and control of the property of which appellants are receivers, and therefore involves a controversy which is cognizable only by the courts of their appointment. The statutory court is accordingly without jurisdiction to adjudicate the subject matter of the counterclaim.

(3) The counterclaim, which necessarily proceeds under paragraph (20) of Section 1 of the Interstate Commerce Act, seeks injunctive relief for a violation of paragraph (18) of that section, which can be had only in a plenary suit brought in a court of competent jurisdiction before a single judge and cannot be heard or decided by the statutory court of three judges whose jurisdiction is limited to a determination of the validity of the order of the Interstate Commerce Commission challenged in the bill of complaint filed in this cause, and cannot be extended to the adjudication of a controversy cognizable only by a single judge.

1.

The counterclaim involves issues which are not germane to those of the bill of complaint and are therefore not the proper subject of a counterclaim under Equity Rule 30.

Equity Rule 30 provides in part as follows:

"The defendant by his answer shall set out in short and simple terms his defense to each claim asserted in the bill * * *.

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit,

> and may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and cross claims."

Taken in its literal meaning the language of this rule, particularly the clause "which might be the subject of an independent suit in equity," would apparently permit the setting up of any counterclaim of any kind whatsoever, provided only that the party who asserts it might have brought an independent suit in equity with respect to the subject matter of the counterclaim. This broad construction, however, would entail startling consequences, for it would permit the intermingling in a single suit of issues wholly unrelated, and thus impart confusion and uncertainty to judicial procedure. For example, a bill filed to enjoin an unlawful action might be met with a counterclaim seeking the specific enforcement of a contract, the subject matter of which was wholly foreign to the cause upon which the bill of complaint itself was founded.

Recognizing the logical consequences of this literal interpretation of the rule, the courts have placed sharp limitations upon it. In *Ohio Brass Co.* v. *Hartman Electric Mfg. Co.*, 243 Fed. 629, suit was filed in the District Court for the Northern District of Ohio alleging infringement of a patent by the defendant. The answer set up a counterclaim for damages caused to the business of the defendant by unlawful threats by the plaintiff against the defendant's

customers and by unfair competitive methods and business practices. The plaintiff moved to strike the counterclaim on the ground, among others, that the facts therein contained would state an independent cause of action in equity and not a counterclaim within the meaning of Equity Rule 30. The court sustained the motion stating:

> "This rule was intended to simplify equity pleading, and not to revolutionize equity practice. All agree that it cannot enlarge the jurisdiction of a federal court, or a court of equity. The set-off or counterclaim must manifestly, therefore, be one cognizable in a court of equity; that is, it must be such as could be made the subject of an independent suit in equity. Manifestly, also, the jurisdiction of the federal court cannot be enlarged by this rule. Obviously, it seems to me, the purpose of this rule was to simplify pleading only, and not to create a new equity practice, and thus permit, under the guise of setting up a set-off or counterclaim, the bringing forward of any matter which will make an independent cause of action cognizable in equity."

The opinion then calls attention to conflicting decisions, with the following comment:

> "The minority reasoning construes set-off or counterclaim as synonymous with cause of action cognizable in equity, as these words are used in Equity Rule 26 (201 Fed. v, 118 C. C. A. v). If the framers of this rule had intended this consequence, they could easily have expressed that intention by using the words 'cause of action cognizable in equity,' instead of 'a set-off or counterclaim which is the subject

> of an independent suit in equity.' There is a wide difference between a cause of action cognizable in equity and a set-off or counterclaim which may be the subject of an independent suit in equity. The minority reasoning ignores this distinction. It breaks down all difference between a cause of action cognizable in equity and a set-off or counterclaim."

The decision in this case has been approved in *Dow Pump & Diesel Engine Company* v. *Wilson-Snyder Mfg. Corp.*, 59 Fed. (2d) 828, and *Frankhart* v. *Metal Lamp Corp.*, 32 Fed. (2d) 920.

In *Durabilt Metal Locker Co.* v. *Berger Mfg. Co.*, 21 Fed. (2d) 139, the court had under consideration a suit for a patent infringement in which the defendant joined to his answer a counterclaim charging the infringement by the plaintiff of another and different patent. The court sustained a motion to strike, explaining that Equity Rule 30 did not modify jurisdictional limitations upon the courts nor abrogate the substantive law that the court would have had no jurisdiction of an independent suit filed by the defendant for the infringement of the patent alleged in the counterclaim, and that consequently it could not entertain such a suit in the form of a counterclaim. In this decision the apparently contrary result reached by the Supreme Court in *American Mills Co.* v. *American Surety Co.*, 260 U. S. 360, 43 S. Ct. 149, 67 L. Ed. 306, is explained and distinguished.

While it would serve no purpose to add indefinitely to the citation of the numerous decisions on this subject, we direct to the attention of the court the

following cases, which, adopting what appears to us to be the logical restrictive interpretation of Equity Rule 30, have denied the right of a defendant to set up in a counterclaim matters constituting a cause of action wholly foreign to the subject of the bill of complaint:

Rome Screenco Co. v. Gaffney Mfg. Co., 5 Fed. Supp. 105;
Lower v. K. & I. Box & Lbr. Co., 6 Fed. (2d) 860;
Parker Pen Co. v. Rex Mfg. Co., 11 Fed. (2d) 533.

The last named case again distinguishes the Supreme Court decision in *American Mills Co. v. American Surety Co.*, *supra*, and is particularly helpful in that, appended to the decision, is a note by the court collecting the authorities.

Applying the rule established by these decisions to the instant case, it is plain that the counterclaim asserted by the intervening defendant here is not within the contemplation of Equity Rule 30. We may concede that he might bring an independent bill in equity to enjoin the operation by appellants, but that alone does not permit him to litigate the subject matter by injecting it by counterclaim into a proceeding dealing with a wholly different question. Appellants' bill seeks to enjoin an order of the Interstate Commerce Commission, and the sole issue raised by the bill is whether that order, and the grounds upon which it proceeds, are tenable. In deciding this question it is unnecessary to determine whether the operation between Fort Benning Junction and the mili-

[illegible] conservation is lawful without a certificate of public convenience and necessity under the provisions of paragraph (1)(E) of Section 7. This latter question is the only one framed in issue by the pretrial order and therefore necessarily must not be passed upon by the court in the adjudication of the issues presented by the [illegible] of complaint. Pleadings [illegible] fall within the principles upon which such motions are here [illegible] and what we deem to be the proper interpretation of Rule [illegible]

The motion may be aided by the decision in Cogdell [illegible] v. Mineral Point Metals Co. [illegible] 77 F. 2d [illegible] wherein it was held that a general allegation of a defendant may issue a subpoena against the plaintiff for the attachment of a patent held by the defendant upon which the plaintiff's suit was based. There the petitioner was a New York corporation and on its motion was ordered to file a bond against defendants costs. Section 53 of the Judicial Code, 28 U. S. C. A. Section 118 provides

> In suits brought for the infringement of letters patent the circuit court [illegible] shall have jurisdiction in all in equity [illegible] the district of which the defendant is an inhabitant or in any district in which the infringement [illegible] and have a regular and established place of business.

The plaintiff moved to strike the counterclaim on the ground that it had not been shown that the

plaintiff was an inhabitant of, or had a regular and established place of business in, the Northern District of Ohio, arguing that since for that reason the court would have had no jurisdiction of an original suit filed against it in that district by the defendants, the court had no jurisdiction under Equity Rule 30 to entertain such a suit in the form of a counterclaim. This Court, however, held that section 48 of the Judicial Code was merely a venue statue, that by filing its suit in the District Court for the Northern District of Ohio the plaintiff waived the right which he might have had to object to the venue of the Ohio court in a patent suit originally brought against him by the defendants, and that the Ohio court therefore had jurisdiction to entertain the counterclaim.

The distinction between that case and the one now before the court is obvious. One of the principal objections here urged against the counterclaim is not merely of venue, but, as will be later shown,* goes to the power of the court to adjudicate the cause of action which the counterclaim attempts to set up. This jurisdictional defect, far more serious and profound than the venue requirements of Section 48 of the Judicial Code considered in the *General Electric Company Case*, is not waived by appellants by filing suit in this court. It is substantive rather than procedural and therefore is not subject to modification or enlargement by Equity Rule 30.

Another vital distinction between the *General Electric Company Case* and the instant suit arises from the fact that the party here interposing the

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Ante, pp. 74 to 81.

counterclaim is an intervenor and not the original defendant. The recent decision of this court in *Chandler & Price Co.* v. *Brandtjen & Kluge*, 296 U. S. 53, 56 S. Ct. 6, 80 L. Ed. 28, demonstrates that the permissible scope of counterclaims is even more narrowly restricted when filed by intervenors than by defendants. A statement of the case and the holding of the court will reveal its significant application to the question here involved.

The suit was brought by the owner of a patent against the user of a printing press which the bill of complaint alleged to infringe a patent held by the plaintiff. The manufacturer of the press used by the defendant was granted leave to intervene, and in his answer set up a counterclaim alleging that the plaintiff was infringing another and different patent owned by the intervenor. The question before the court was whether such a counterclaim could be properly asserted under Equity Rule 30. The intervenor urged that, since it manufactured the article involved in the suit and the defendant was merely the user, the intervenor was the real party in interest, and the counterclaim should therefore be permitted in order to settle in a single suit the entire controversy between the parties primarily interested.

This Court, however, held otherwise. It stated that the intervenor's position in relation to the case differed essentially from what it would have been had the intervenor been named as a defendant against whom a cause of action in the principal suit existed. In such a case, the Court said, the intervenor, as principal defendant, would have had the right to set up the counterclaim against the plaintiff under the

rule announced in the *General Electric Case* and other similar decisions. Here, however, the plaintiff's cause of action was the use by the defendant of a single machine which the plaintiff claimed infringed a patent owned by it, and in the patent which the counterclaim alleged to have been infringed the actual defendant had no interest whatsoever. There was therefore no foundation for the claim that the defendant sued was not, or that the intervenor was, the real defendant in interest, and since the principal defendant was not concerned with the issues between the intervenor and plaintiff which were raised by the counterclaim the intervenor was not entitled to inject into the main suit and to have adjudicated a controversy solely between it and the plaintiff. In answering the intervenor's contention that counterclaims allowed by Equity Rule 30 are not restricted to those required or permitted to be set up by an original defendant in contra distinction to an intervening defendant the court said that while a distinction between the two is not expressly made, the context in which the word "defendant" is used in the rule is inconsistent with the view that it includes in every sense a party permitted to intervene.

The opinion ends with this significant statement:

> "Intervenor's counterclaim, involving nothing in which defendant is concerned, does not constitute the interest referred to in Rule 37.
>
> "Exclusion from the litigation of that demand is consonant with reason and in the interest of justice. Introduction by intervention of issues outside those that properly may arise between the original parties complicates

> the suit and is liable to impose upon plaintiff a burden having no relation to the field of litigation opened by his bill. *Lemer v. K. & L. Box & Lumber Co.*, (D. C.) 6 Fed. (2d), 666; *Gregory v. Pike*, (C. C. A. 1st) 67 Fed. 337, 343. In the absence of language definitely requiring it the construction of Rule 30 for which the intervenor contends cannot reasonably be maintained. The counterclaim against the plaintiff was rightly dismissed."

The same reasoning would exclude the counterclaim here.

In citing this decision we do not overlook a possible distinction which may be urged against its application to the precise question here presented. The counterclaim there asserted infringement of a patent neither owned nor used by the defendant and therefore injected into the litigation a controversy in which the defendant could have no interest. Here it may be said that since the counterclaim seeks to enjoin an operation asserted to be in violation of section 1 (b) and the principal defendant the United States might well have sought the injunction asked by the intervenor the defendant here is not a complete stranger to the issue raised by the counterclaim.

The rule announced by the decision, however, is not we submit susceptible of so narrow an interpretation. As already stated the bill of complaint in this suit merely assails the Commission's order. Neither the United States nor the Commission has questioned the legality of appellant's operation under section 1 (b). The issue raised by the original parties is therefore confined to the validity of the order.

and may be decided without reference to the subject matter of the counterclaim. The decision in the *Brandtjen & Kluge Case* plainly discloses the disposition of this court to permit the parties to define the scope of the controversy between them, and to exclude from the field of litigation questions which are extraneous to its settlement. Measured by this test the intervenor's counterclaim in the pending suit should clearly have been stricken.

2.

The counterclaim seeks affirmative relief which, if granted, would directly affect the possession, management and control of the properties of which appellants are receivers. It is therefore cognizable only by the courts of their appointment and cannot be adjudicated by the statutory court.

The right claimed by the Central to enjoin in this court appellants' operation over the Fort Benning track is asserted against receivers appointed by the District Court of the United States for the Eastern District of Virginia and the Southern District of Florida (Bill of Complaint, Section I, R. 1), and authority to sue has not been obtained from either of the receivership courts. Under established principles those courts have an exclusive jurisdiction over appellants and the possession, management and control of the property of the receivership estate which is wholly incompatible with the power of the statutory court to grant the relief sought by the counterclaim.

In the leading case of *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 69, 28 S. Ct. 182, 52 L. Ed. 379,

holders of equipment trust certificates of the railway, which was in the hands of receivers appointed by a federal court, filed a bill in equity in a state court to establish and enforce by sale the lien of their certificates. The Court held that the state court was without power to decree the sale of the property, stating:

> "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it."

Murphy v. *John Hofman Co.*, 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327, involved a replevin action brought in a state court by a claimant of property in the hands of a receiver appointed in bankruptcy proceedings in a federal court. This Court denied the right to prosecute the action in the state court for the following reason:

> "Where a court of competent jurisdiction has taken property into its possession, through its officers. the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised though it is not authorized by any statute. The jurisdiction in such cases

the receivership court in the exercise of its primary jurisdiction over the appointment of receivers or direct the lower court in the various steps in the administration of the receivership estate. In this instance the rule of the exclusive jurisdiction of the receivership court was held to run against a court of appellate rather than concurrent or coordinate jurisdiction

In *Viela v. Kansas City Refining Co.*, 9 Fed. (2d) 213, a party claiming title to property in the hands of a federal receiver asked leave of the receivership court to sue in a state court to establish his title, for damages for trespass and for ejectment. On appeal from an order denying his petition it was held that since the property was in possession of the receivership court it was withdrawn from the control of all other courts, and the receivership court, having power to hear and determine all controversies relating to the property in its possession, could properly deny the right to litigate the title and possession of such property in any other forum. This case is cited not merely as cumulative authority for the principle here involved, but because it applies the doctrine to *an effort in a foreign court to oust a receiver of railroad property from possession and operation of a part of the trackage under his management, which in final analysis is what the intervening defendant here seeks to accomplish by his counterclaim.*

It may be said that these cases deal with *possessory* rights of the receiver to the property of the estate, to a threatened disturbance of the *res* in his custody, and are not authority for the extension of the exclusive jurisdiction doctrine to a case which, as here, involves

the operation of a truck not owned by the corporation in receivership. Such a distinction is wholly inadmissible. In *Dickinson v. Willis* 209 Fed. 171 employees of the Rock Island brought suit against the railway in the state court to restrain an alleged violation of their seniority rights. After securing a temporary restraining order a settlement agreement was reached and the case was dismissed. On final hearing the injunction was denied and an appeal was taken by the employees to the state appellate court.

While the appeal was still pending and the suit against the railway was apparently at an end, the dissatisfied employee then filed a petition in the state court against the railway company and the trustees in the settlement of the original litigation, seeking in the state courts the very relief which he had sought to secure by the temporary injunction issued by the federal court pending appeal to the state appellate court, regardless of the final decree in the case which the railway had in fact obtained. An injunction was accordingly issued restraining the violation of the seniority rights. A demurrer to the petition was granted after which the case was dismissed. It was held that the suit in the state court was an attempt to enjoin the federal court in the exercise of its jurisdiction, and that the state court was without jurisdiction to enter any order affecting the property in the custody

in effect one to compel the specific performance of an agreement to permit the original temporary injunction in the state court to remain in effect. The suit was not therefore of the nature which under Section 66 of the Judicial Code might be brought against the receiver without leave of the appointing court, but rather one which involved the possession, use and administration of the property in the receivers' hands and was therefore in the exclusive jurisdiction of the receivership court. After citing numerous cases, the court said:

> "It is true that in most of the foregoing cases questions of property were involved, *but I see no distinction between the possession of property and the management of property so far as the questions here involved are concerned.** If the district court of Linn County, Iowa, has the power to prescribe the class of persons who shall be employed by the receiver, then it has the power to prescribe how many hours a day they shall work, if it were claimed that a contract therefor was made with the railway company; it has power in a proper case to restrain the receiver from employing members of Brotherhoods, or the reverse. It would also have power, upon presentation of a proper contract made with the railway company, *to prescribe by injunction the number of trains that should be run, and the crossings that should be maintained, and the rentals that should be paid and to enforce mostly any other condition affecting the manner in which the receiver shall conduct the business of his office.*"*

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*Emphasis ours.

If a controversy between a railroad receiver and his employees is one so closely related to and so vitally affecting the administration of the receivership estate as to exclude adjudication by any court other than that having custody of the property, so, *a fortiori*, is an attempt to restrain operation of a part of the line, whether it is owned by the receivership estate or operated under lease or trackage rights. If the statutory court can determine the right of appellants to operate the Fort Benning track by the same token it may adjudicate the legality of their operation of a branch, a section or a division of the system. The statutory court's jurisdiction is dependent upon the nature of the right asserted against the receivership property, custodianship or management, and not upon the extent or degree of the threatened encroachment. A slight trespass upon the province of the receivership court is as violative of the rule of comity as is an aggravated one.

We think it clear, therefore, that the counterclaim should be stricken because it presents a controversy the adjudication of which lies solely in the jurisdiction of the receivership courts.

3.

Since the jurisdiction of the statutory court of three judges is limited to a determination of the validity of the order of the Commission challenged by the bill of complaint filed in this cause it cannot be extended to the adjudication of the counterclaim which, seeking injunctive relief under paragraph (20) of Section 1 of the Interstate Commerce Act, is cognizable only by a single judge.

This is a suit brought pursuant to what was originally a part of Section 1 of the Commerce Court

Act of June 18, 1910 (36 Stat. 539, 28 U. S. C. A., Sec. 47a), and the Urgent Deficiencies Act of October 22, 1913, abolishing the Commerce Court and transferring its jurisdiction to district courts. That it is therefore a statutory proceeding before a special court whose jurisdiction is manifestly limited to the controversy for the adjudication of which it was created and assembled is an elementary and self-evident proposition.

The counterclaim, on the other hand, necessarily proceeds under paragraph (20) of Section 1 of the Interstate Commerce Act providing that a violation of paragraph (18) or (19) of Section 1 of that Act may be enjoined by any court of competent jurisdiction. Admittedly such a suit must be brought before a single judge and cannot be heard or decided by the statutory court of three judges before whom the instant case is pending.

To avoid this obvious jurisdictional obstacle to the counterclaim it may be suggested that the three judge court sitting in this cause was the District Court for the Southern District of Georgia in the sense that the single judge who, but for the statutory compulsion to call two additional judges to his assistance, would be presiding in the district court was a member of the three-judge court; and that the single judge so sitting may hear and determine the counterclaim as a part of the main proceeding quite as effectively as though it had been brought as an independent plenary suit before him. One primary error in this position lies in the fact that the three-judge court, created and assembled, as it is, for the single purpose of hearing a particular controversy, must be considered a judicial

in Cleveland, and authorizing the use of a new joint terminal in that city. The Pittsburgh & West Virginia, a connecting carrier, had appeared before the Commission and opposed the granting of the certificate upon the ground that a bill under the Transit Discrimination Act, the purpose of which was twofold, first to enjoin the Wheeling from abandonment of certain and from performing contracts made by it with other lines with such abandonments in view, secondly to set aside and annul the order of the Commission granting the certificate of public convenience and necessity. The decision of the three-judge court is thus stated in the opinion on appeal:

> The P[illegible] moved for an interlocutory injunction. As the bill sought to suspend and set aside an order of the Interstate Commerce Commission, the district judge called to his assistance two additional judges, pursuant to the Urgent Deficiencies Act, October 22, 1913, chap. 32, 38 Stat. at L., 208, 219, 220. By consent of the parties, the case was then heard as upon final hearing; and the court entered a final decree dismissing the bill on the merits as to both classes of relief prayed for. It declared, however, that the questions concerning the alleged violation of Ohio law, the competency of the Wheeling's directors and the other grounds of attack on the Wheeling's action were not properly before it as a three-judge court. But, since diversity of citizenship *existed and the district judge concurred in the judgment,** the court passed on them and reserved to appellant the right to sever these issues for purposes of appeal and treat its

*Emphasis ours.

decision can there be the decision of a single judge

The court held that the three judge court had no jurisdiction to [illegible] The first that the [illegible] no equitable interest [illegible] no movement here [illegible] ruling upon the application [illegible] said

The purpose that the [illegible] at the Wheeling should be enjoined because it directors held office illegally [illegible] to their trust and [illegible] rights of stockholders [illegible] and hence that the Wheeling [illegible] exercise the authority granted to it by the Commission was not properly [illegible] suit and is not subject to review [illegible] on a direct appeal An application for [illegible] relief may not be included [illegible] Urgent Deficiencies Act to set aside the order of the Interstate Commerce Commission [illegible] Cleveland C C & St L R Co v United States 277 U S 404 414 72 L Ed 939 941 48 S Ct Rep 129 Great Northern R Co v United States 277 U S 172 181 72 L Ed 839 842 48 S Ct Rep 486 It is neither [illegible] upon the judgment as to the merits But if that character may be [illegible] the plenary equity jurisdiction [illegible] cases Such a suit would [illegible] by a single judge and [illegible] case only to the Circuit Court [illegible]

[illegible]

Hence, the Court declared, the three-judge court should have dismissed the bill not on its merits but because of the misjoinder, in a bill brought under the Urgent Deficiencies Act, of an application for relief invoking the plenary equity jurisdiction of the district court cognizable only by a single judge.

The case is clearly parallel to that here before the court. The only difference lies in the fact that there the prayer for equitable relief held to be objectionable was found in the bill of complaint, whereas here it is attempted to be injected into the proceeding through the counterclaim. The decision, however, condemns the joinder because it intermingled with a three-judge court proceeding an issue which could be heard only by a single judge; and the principle upon which it is founded is plainly applicable regardless of the particular pleading in which the misjoinder appears or the party who is responsible for it.

A novel circumstance peculiar to the instant case lends further pertinency to the conclusion reached by the court in the above decision. Following the entry of the decree below appellants were, and still are, of the opinion that that part of the decree adjudicating the counterclaim could not be reviewed by this Court on direct appeal and have so advised the court in a Supplementary Statement as to Jurisdiction. Confronted, however, with the possibility that this Court may hold that a direct appeal of this part of the decree is permissible, they have included in it the matters submitted for review here. If, however, appellants had awaited this Court's decision on the question without taking further action, and this

Court holds that the decree of the lower court on the counterclaim cannot be appealed directly, they would have been barred by lapse of time from a review of this aspect of the case by the Circuit Court of Appeals for the Fifth Circuit (Judicial Code, Sec. 240, sub-Sec. 8(c), (U. S. C. A., Title 28, Sec. 230). To guard against this possible forfeiture they have concurrently appealed to the Circuit Court of Appeals. That appeal is being held in abeyance until the ruling of this Court decides whether its prosecution is necessary.

From this recital of procedural difficulties the uncertainty and delay which have resulted from the refusal of the statutory court to exclude the counterclaim from the litigation are apparent. Equity Rule 30 was intended to simplify equity pleading (*Ohio Brass Co.* v. *Hartman Electric Mfg. Co.*, 243 Fed. 629), and should not be so construed as to permit the confusion of which its interpretation by the lower court in this case is a direct consequence.

Thus, since, as a matter of law, the three-judge court could not permit the inclusion of an application for equitable relief which is within the plenary jurisdiction of a single judge court in a bill of complaint brought before a three-judge court under the Urgent Deficiencies Act, clearly such a court should not entertain a counterclaim which, if brought as an independent action, would lie only before a single judge. For this reason, as well as those advanced in the earlier part of this brief, the motion to strike the counterclaim should have been sustained.

F.

Regardless of whether the counterclaim should have been stricken, the operation of the Fort Benning track is a switching or terminal movement within the purview of paragraph (22) of Section 1, and therefore does not require a certificate of public convenience and necessity from the Commission.

If, as appellants contend, the counterclaim should have been stricken, whether operation of the Fort Benning track without a certificate of public convenience and necessity from the Commission violates Section 1(18) of the Interstate Commerce Act is removed from the case as a material issue, and the validity of the Commission's order must be decided without reference to this question. But since the statutory court held the operation to be an extension of line and assigned the resultant conflict with the statutory proscription of Section 1(18) as one of the grounds for sustaining the validity of the Commission's order, it is appropriate to a comprehensive treatment of all phases of the decision to discuss the question on its merits.

Throughout the proceedings before the Commission and the statutory court appellants have maintained that the services performed between Fort Benning Junction and the military post are switching movements and essentially a part of a terminal delivery service rather than an extension of operation. As such they are not within the purview of Section 1(18) and no certificate of public convenience and necessity is required. *New York Dock Railway*

Pennsylvania R. Co., 62 Fed. (2d), 1010. Certiorari denied, 289 U. S. 750, 53 S. Ct. 694, 77 L. Ed. 1495.

Regarding the physical conditions at Fort Benning Junction, the track in question, some six miles in length, is used exclusively to reach the military post. There are no other sources of traffic along its route, and shipments are received and delivered only at Fort Benning proper (R. 122). Except for its length, which of itself is not controlling, it is essentially similar to many other tracks independently owned or industrial in their nature by which railroads commonly serve large plants adjacent to their main lines.

Section 1(18), has been frequently before the courts for a judicial determination of its scope and effect in a variety of cases where its application has been questioned. The Act speaks in general terms, providing extension of the Act's operation where the Commission, after hearing, finds that the public convenience and necessity permit or require such extension. It might be expected that the Commission would refrain from attempting to define those general terms in specific cases, leaving that task to the courts. In fact, however, the Commission has frequently undertaken to define in specific cases the terms of the statute. The courts have sometimes approved and sometimes disapproved the Commission's action. It is not necessary to trace here the history of the statute and the decisions from which it stems.

We have already referred to [illegible] the Commission's findings in the present case, having the broad purpose of the statute in mind, that an adequate railroad system [illegible] recognized that the

> "conservation of the financial resources of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public * * *" *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277, 46 S. Ct. 263, 70 L. Ed. 578, 584.

Primarily, then, it was intended by Section 1(18) that outlays for construction purposes be subjected to the Commission's scrutiny in order that injudicious and unnecessary expenditures might be avoided.

The cost of securing the right to operate over new lines as well as the expense of their actual construction is also contemplated by the Act. Thus the acquisition of trackage rights involving payment of substantial rental has been held to require a certificate. *Transit Commission v. U. S.*, 289 U. S. 121, 53 S. Ct. 536, 77 L. Ed. 1075.

The creation of theretofore non-existent competition between carriers by invading territory already served is another factor to which the courts have attached importance. In the *Texas & Pacific Case, supra*, the court said:

> "But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern."

Invasion of competitive territory and diversion of

earnings have been the controlling factor in the following decisions holding Section 1(18) applicable.

Southern Pac R Co v Western Pac R Co 61 Fed (2d) 732,

Missouri Pac R Co v C R I & P Ry Co, 41 Fed (2d) 182, certificate denied 282 U S 866,

El Dorado & W Ry Co v C R I & P Ry Co, 5 Fed (2d) 777

Marion & E R Co v Mo Pac R Co 149 U S 492

On the other hand the mere possibility of reaching competitive territory through a track connection does not constitute the connection an extension within the meaning of Section 1(18), *C C C & St L Ry Co v U S*, 275 U S 401, 48 S Ct Rep 139, 72 L Ed 333. And where a track was built for the sole purpose of permitting two lines to connect and thus restore interchange of traffic which had been interrupted by the appropriation of a former connecting track by a third line it was a spur track not requiring a certificate. *Mo Pac R Co v Union Pac R Co* 60 Fed (2d) 126

The decisions above cited do not involve in all cases physical or traffic characteristics presented here and they are not offered as exact parallels or controlling authorities. But if we examine the Fort Bragg situation in the light of the attitude of the courts toward Section 1(18) disclosed by the adjudicated cases it is clear that we do not find inherent in the services rendered by the Seaboard any of the potential evils which Section 1(18) was designed to eradicate

First, no construction or investment of any kind is necessary or contemplated (R. 112). The physical plant used in effecting the arrangement is available without a dollar of outlay on the part of either appellants or Page & Harris. In virtually all of the decided cases substantial investment in new construction was proposed. This feature is wholly lacking here.

Second, no new territory is to be reached. Prior to the publication of the tariff here in issue appellants or their corporate predecessor served the military post by delivering traffic to Page & Harris at Fort Benning Junction precisely as they do now. The only change resulting from the publication of the tariff is the assumption by appellants of the responsibility for and cost of the switching service between the junction and the military post. The actual physical operations, however, remain the same as they have been ever since Page & Harris replaced the Central of Georgia in October, 1932.

Third, there is present no element of invasion of a preempted territory. Whatever may have been the comparative accessibility of the traffic at Fort Benning to the two trunk lines prior to the commencement of Page & Harris' operations, since that time the military post has been open to both on equal terms, and the competitive situation is and will remain unaffected.*

While no single factor may be said to be decisive in a case of this character, it is plain that none of the considerations to which the courts have given weight

*Doubtless the Central of Georgia has lost some traffic by its refusal to enter into the same agreement with Page & Harris as the Seaboard has. This, however, is of its own choosing. Page & Harris are ready and willing to provide the same service to both lines, and on the same terms (R. 157).

in construing Section 1(18) is present here. Taken as a whole what has been done to improve transportation conditions at Fort Benning cannot be fairly said to fall within the prohibitions of Section 1(18).

This view is fortified, if not conclusively settled, by the attitude of the Commission as expressed in a report issued shortly before the order here under attack was issued. At Fort Bragg, N. C., there is located a large military reservation the transportation facilities of which are physically similar to, if not identical with, those at Fort Benning. Page & Harris, through Cape Fear Railways, likewise operate the track connecting the adjacent trunk lines with the reservation proper. In *Atlantic Coast Line Railroad Company* v. *Cape Fear Railways*, 197 I. C. C. 397, the Coast Line sought a reduction of the divisions theretofore retained by the Cape Fears on traffic delivered to and received from the reservation. In granting the requested relief the Commission relied largely upon its conclusion (p. 408) "that the services rendered by the defendant [Cape Fear] in connection with the traffic under consideration *are in their nature mere switching movements.*"* The characteristics of the operations at the two military posts are so similar as to admit of no logical distinction between them. If, as the Commission has held, the Fort Bragg operation is a switching movement so likewise is that at Fort Benning.

Finally, in *United States* v. *Idaho*, 298 U. S. 105, 56 S. Ct. 690, 80 L. Ed. 677, this court has recently considered and decided the applicability of Section

*Emphasis ours.

point and that received at the two members is evident. The Idaho track was built to serve the Fort Benning track wholly in the aforementioned. Both served only a small local industry. In neither case was regular train service provided. Stations or loading platforms were maintained along either road in both instances cars were usually ordered as they were required. The service between the Idaho mine and that here before the Court is there so close as to be virtually coincident at the junction under discussion.

Apparently it was to something for grounds upon which to attack the contract arrangement that Pollard for the first time connected all the movement between the connection and the industry as a line haul. Prior to that time there is every indication that like the Commission he considered it only a switching operation. Both reports of the Commission in Finance Docket 9709 state that if the Central operated the track to the reservation it would make Fort Benning a common point on the two trunk lines "charging the Seaboard only the cost of the service for switching to and from the junction." Paragraph 14 of the Central's petition for intervention there states "The service on the Fort Benning line is essentially switching service." R. 21. and paragraph 16 repeats the view. R. 21. When pleading his own right to operate the track the service is apparently a switching movement while in opposing performance by others it becomes an extension of operation for which a certificate is required. Such frankness of position may be opportune but it is scarcely persuasive of the soundness of the contention here urged.

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*R. [illegible] 22, 31.

In closing the discussion of this feature of the case we emphatically repeat that since the counterclaim should have been stricken, whether appellants' operation of the Fort Benning track is in conflict with Section 1(18) is a wholly academic question on this appeal. Viewed in the abstract, however, we submit that under the facts of record it is plain that the service between Fort Benning Junction and the military reservation is a switching or terminal delivery movement within the meaning of paragraph (22) of Section 1 as construed by this court for which a certificate from the Commission is not required.

VI.

CONCLUSION.

The ramifications of this case and the peculiar procedural complexities involved present a variety of issues of coordinate materiality and importance which we have endeavored to discuss in an orderly and logical fashion. In concluding the argument it is not inappropriate to suggest a final consideration which lends perspective to the anomaly of the order of the Commission here under attack. Excluding discriminatory results and the creation of destructive competition—tendencies which can play no part in this case because the record contains no evidence touching upon either—a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making and service as it seems best. *U. S.* v. *Chicago M. St. P. & P. R. R. Co., supra; U. S.* v. *Illinois Central R. Co.*, 263 U. S. 515, 44 S. Ct. Rep. 189, 68 L. Ed. 417. The competition of other forms of transportation i

now so serious, notorious and damaging to the rail carriers that the courts cannot fail to take cognizance of it. As this competition grows keener the right to manage their own affairs within the limits of regulatory law and to frame their own policies becomes more and more essential to the railroads, for they must adapt their practices to new conditions, and, by establishing a flexibility of service heretofore unknown, conform to modern requirements and demands. One of the complaints against railroad management most frequently heard from both their friends and enemies is the rigidity of their policies and their failure to make a realistic attempt to meet changed conditions by providing more flexible and convenient service.

Much progress in this direction has already been made, e. g., the establishing of store-door pick-up and delivery and other forms of coordinated service.* We have demonstrated that if the principle upon which the Commission has decided this case [illegible] would virtually confine the service that rail carriers may perform to their own tracks, to stand in the managerial discretion in devising methods of meeting competition is defeated and the independence of action so essential to the solution of present difficult problems is frustrated. These are not considerations of policy alone, but have a very real and direct bearing upon substantive rights. The regulation of carriers by other laws is not static but must be dynamic and interpreted in the light of changing conditions. When the Commission, in a most important and [illegible] progressive decision, as in this case, [illegible] a carrier cannot lawfully go beyond its own rails

* [illegible]

the validity of its action must be appraised not by a fixed and inalterable standard but in the light of contemporary conditions. So measured the order clearly transcends its power.

We therefore submit that for the reasons fully set forth in this brief the order of the Commission is null and void, that the decree of the statutory court should be reversed, and that the cause should be remanded with instructions that the counterclaim of intervening defendant Pollard be stricken and the relief prayed by appellants in their bill of complaint be granted.

Respectfully submitted,

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CHAS. T. ABELES,
Counsel for Appellants.

Norfolk, Virginia,
December 1, 1936.

APPENDIX A.

Interstate Commerce Act, Section 6.

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, re-

schedule in force at the time and kept open to public inspection: Provided, That the Commission may in its discretion and for good cause shown allow changes upon less than the notice herein specified or modify the requirement of this section in respect to publishing, posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions. For such purpose the Commission is hereby authorized to make suitable rules and regulations for the classification of schedule of rates, fares, charges and classifications and to prescribe such rules and regulations from time to time amendatory of or changes in any rate, fare, charge or classification without filing complete schedule covering rates, fares, charges or classifications not changed or in or otherwise as may be necessary or appropriate to carry out the purposes of this part and the public interest.

(b) The names of the several carriers which are parties to any joint tariff shall be specified therein and each of the parties thereto other than the one filing the same shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to show in the copies of the tariffs kept open to public inspection that the carriers filing the same have not given their concurrence thereto.

(c) Every common carrier subject to this part shall also file with said Commission copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this part to which it may be a party

(6) The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

(8) That in time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared,

and no such embargo shall apply to shipments so consigned.

"9. The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

"10. In case of failure to comply on the part of any carrier, penalty or forfeiture to comply with the terms of any regulation adopted and prescribed or any order made by the Commission under the provisions of this section, such carrier shall be liable to a penalty of five hundred dollars for each such offense and twenty-five dollars for each and every day of the continuance of such offense which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"11. If any common carrier subject to the provisions of this section shall make any unjust discrimination in the rates or charges for the transportation of passengers or property or shall make or give any undue preference or advantage to any particular person or locality in any respect whatsoever or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such carrier shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars or by imprisonment in the penitentiary for a term of not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.

"12. Nothing in this section shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, State, municipal or other governments, or for charitable purposes, or to or from fairs and exhibitions for exhibition thereat, or the issuance of passes or tickets to bona fide employees, agents, surgeons, officials, and attorneys at law of carriers, and members of their families, and ministers of religion, or the relief of persons shipwrecked, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this section shall prohibit any carrier from giving reduced rates to ministers of religion, or charitable, educational, or eleemosynary institutions, or persons traveling for the purpose of organizing or promoting the formation of such institutions, and the issuance of passes or tickets to such persons; nothing in this section shall prohibit the issuance of passes or tickets to officers, agents, surgeons, physicians, and attorneys at law of such carriers, and members of their families; nothing in this section shall prohibit any carrier from issuing passes or tickets to persons engaged exclusively in the business of charitable and educational work, and those having in charge the sick or indigent poor, when such persons are traveling exclusively for the purpose of such work, or to the officers, agents, employees, or members of the families of any of the foregoing specified persons; nothing in this section shall prohibit the exchange of passes or tickets for the purpose of providing for the free transportation of the officers, agents, employees, or members of the families of the officers, agents, and employees of railroads, telegraph, telephone, express, and sleeping-car companies; nothing in this section shall prohibit any carrier from carrying passengers or property free or at reduced rates for the Young Men's Christian Association, Young Women's Christian Association, National Red Cross, Army Relief Societies, and such other associations as may be designated by the Commission; nothing in this section shall prohibit any carrier from issuing passes or tickets to its own pensioners; nothing in this section shall prohibit any carrier from issuing passes or tickets to persons in the military, naval, or other service of the United States, State, municipal or other governments, or to the officers, agents, surgeons, physicians, attorneys at law, and members of the families of such persons

higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

(12) It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form "The Station Agent of the Company at Station," together with the name of the proper post office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post office.

(13) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single state, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage

in the same, in the following particulars in addition to those relating to the jurisdiction given by the Act to regulate railway traffic, as amended June eighteenth nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the docks at which cars or cargoes of passengers or property are to be received by directing the rail carrier to make suitable connection between its line and a track or tracks which are or may be constructed from the dock to the limits of the railroad right of way, or by directing such connection to be made between rail and water carriers individually or in connection with one another by connecting and switching tracks with the lines of the rail carrier or tracks constructed by the owner. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may either in the construction or the operation of such tracks determine what car shall be used or in the other service provided that nothing in the order authorized by the Commission under the provisions of this paragraph shall be subject to the same exceptions as to findings of public convenience and necessity and other matters as is contemplated under section 1 of this part.

(b) To establish through routes and maximum joint rates between and over rail and water lines and to determine the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates or maximum or minimum or maximum and minimum proportional

rate by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rate are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United State to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

APPENDIX B

Interstate Commerce Act, Section 1 Paragraphs (18) to (22)

(18) After ninety days after this paragraph shall take effect no carrier by railroad subject to this part shall undertake the extension of any line of railroad or the construction of a new line of railroad or shall acquire or operate any line of railroad or extension thereof or shall engage in transportation under this part over or by means of any such new or extended line of railroad unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or such extension or acquisition or operation of such railroad line or extension thereof and no railroad corporation shall begin the construction of any railroad line or extension thereof without having first obtained a certificate that public convenience and necessity require or will require such construction, and any railroad corporation proposing to construct any railroad line or extension thereof shall, before beginning such construction, apply to the Commission for a certificate that public convenience and necessity require or will require such construction, and shall submit with such application such information as the Commission may require. The Commission shall issue or refuse certificates as applied for or may issue them for the partial exercise only of the privilege sought by the application, after due notice and opportunity for hearing as provided in the case of complaints. No certificate shall be required under this paragraph for the construction of a railroad connecting with the railroad of the applicant, and extending into any State contiguous to the State in which such railroad of the applicant is located, for a distance not exceeding ten miles, for the purpose of enabling the applicant to connect its railroad with a railroad already constructed in such contiguous State, nor shall any certificate be required under this paragraph for the construction or operation of a railroad exclusively within a single municipality or its suburbs, or for the extension of any railroad which, on February 28, 1920, was operated by the owner or lessee of such railroad, or for the acquisition or operation of any railroad or extension thereof which, on February 28, 1920, was owned or operated by the applicant or its lessor, or for the temporary extension or operation of a railroad for a period not exceeding one year and not involving the construction of any bridge or terminal facilities, if the Commission shall find that such temporary extension or operation is required by public convenience and necessity, or for the construction, acquisition, or operation of any railroad or extension thereof which the Commission finds will be of an emergency character and necessary in time to meet the immediate demand or need for railroad transportation, and will not unduly impair the ability of the applicant to render adequate service to the public as a railroad corporation, or for the acquisition or operation of any railroad or extension thereof which the Commission finds will be of an emergency character and necessary in time to prevent the cessation or interruption of railroad transportation over the railroad sought to be acquired or operated

[illegible] railroad by the operation thereof, or any part thereof, to be abandoned with the right to be heard in hereinafter provided with respect to the hearing on complaint on the issuance of certificates, and notice hereof shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operated.

(19) The Commission shall have power to issue such certificate as prayed for or to refuse to issue it or to issue it for a portion or portions of a line of railroad or extension thereof described in the application or for the partial exercise only of such right or privilege and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After the issuance of such certificate and not before the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby. Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person acting for or employed by such carrier who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon con-

section thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years or both.

(21) The Commission may, after hearing in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, parties to such proceeding, to provide itself with such adequate facilities for performing as a common carrier the car service as that term is used in this part and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds as to such extension that it is reasonably required in the interest of public convenience and necessity or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks located or to be located wholly within one State, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

APPENDIX C

Emergency Railroad Transportation Act, 1933.

* * * * This Act may be cited as the "Emergency Railroad Transportation Act, 1933."

TITLE I EMERGENCY POWERS

SEC. 1. As used in this title

(a) The term "Commission" means the Interstate Commerce Commission.

(b) The term "Coordinator" means the Federal Coordinator of Transportation hereinafter provided for.

(c) The term "committee" means any one of the regional coordinating committees hereinafter provided for.

(d) The term "carrier" means any common carrier by railroad subject to the provisions of the Interstate Commerce Act, as amended, including any receiver or trustee thereof.

(e) The term "subsidiary" means any company which is directly or indirectly controlled by, or affiliated with, any carrier or carriers. For the purpose of the foregoing definition a company shall be deemed to be affiliated with a carrier if so affiliated within the meaning of paragraph (8) of Section 5 of the Interstate Commerce Act, as amended by this Act.

(f) The term "employee" includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of

rendition of his service) who performs any work defined as that of an employee or subordinate official in accordance with the provisions of the Railway Labor Act.

(g) The term "State commission" means the commission, board, or official, by whatever name designated, exercising power to regulate the rates or service of common carriers by railroad under the laws of any State.

SEC. 2. In order to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting, from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of transportation, there is hereby created the office of Federal Coordinator of Transportation, who shall be appointed by the President, by and with the advice and consent of the Senate, or be designated by the President from the membership of the Commission. If so designated, the Coordinator shall be relieved from other duties as Commissioner during his term of service to such extent as the President may direct; except that the Coordinator shall not sit as a member of the Commission in any proceedings for the review or suspension of any order issued by him as Coordinator. The Coordinator shall have such powers and duties as are hereinafter set forth and prescribed, and may, with the approval of the President, and without regard to the civil service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such assistants and agents, in addition to the assistance provided by the Commission, as may be necessary

to the performance of his duties under this Act. The office of the Coordinator shall be in Washington, District of Columbia, and the Commission shall provide such office space, facilities, and assistance as he may request and it is able to furnish. The Coordinator shall receive such compensation as the President shall fix, except that if designated from the Commission he shall receive no compensation in addition to that which he received as a member of the Commission.

SEC. 3. The Coordinator shall divide the lines of the carriers into three groups, to wit, an eastern group, a southern group, and a western group, and may from time to time make such changes or subdivisions in such groups as he may deem to be necessary or desirable. At the earliest practicable date after the Coordinator shall have initially designated such groups there regional coordinating committees shall be created one for each group, and each committee shall consist of two regular members and two special members. The carriers in each group acting each through its board of directors or its receiver or receivers or trustee or trustees or through an officer or officers designated for the purpose by such board, shall select the regular members of the committee representing that group and shall prescribe the rule under which such committee shall operate, but no railroad system shall have more than one representative on any such committee. In such selection each carrier shall have a vote in proportion to its mileage lying within the group. The two special members of each committee shall be selected in such manner as the Coordinator

may approve, one to represent the steam railroads within the group which had in 1932 railway operating revenues of less than $1,000,000 and the other to represent electric railways within the group not owned by a steam railroad or operated as a part of a general steam railroad system of transportation. Each such special member shall have reasonable notice of all meetings of his committee at which any matter affecting any carrier which he represents is to be considered and may participate in the consideration and disposition of such matter. Members of the committees may be removed from office and vacancies may be filled in like manner.

SEC. 4. The purposes of this title are (1) to encourage and promote or require action on the part of the carriers and of subsidiaries subject to the Interstate Commerce Act as amended which will (a) avoid unnecessary duplication of services and facilities of whatsoever nature and permit the joint use of terminals and trackage incident thereto or requisite to such joint use: *Provided*, That no routes now existing shall be eliminated except with the consent of all participating lines or upon order of the Coordinator, (b) control allowances, accessorial services and the charges therefor, and other practices affecting service or operation, to the end that undue impairment of net earnings may be prevented, and (c) avoid other wastes and preventable expense; (2) to promote financial reorganization of the carriers, with due regard to legal rights, so as to reduce fixed charges to the extent required by the public interest and improve carrier credit; and (3) to provide for the immediate study of other means of improving con-

dation surrounding transportation in all its forms and the preparation of plans thereto.

Sec. 5. It shall be the duty of the committees on their own initiative, generally within each group and jointly where more than one group is affected, to carry out the purposes set forth in subdivision (1) of Section 1, so far as such action can be voluntarily accomplished by the carriers. In such instances as the committees are unable, for any reason, legal or otherwise, to carry out such purposes by such voluntary action, they shall recommend to the Coordinator that he give appropriate directions to the carriers or subsidiaries subject to the Interstate Commerce Act, as amended, by order, and the Coordinator is hereby authorized and directed to issue and enforce such orders if he finds them to be consistent with the public interest and in furtherance of the purposes of this title.

Sec. 6. (a) The Coordinator shall confer freely with the committees and give them the benefit of his advice and assistance. At his request, the committees, the carriers, the subsidiaries, and the Commission shall furnish him, or his assistants and agents, such information and reports as he may desire in investigating any matter within the scope of his duties under this title; and the Coordinator, his assistants, and agents, and the Commission, shall at all times have access to all accounts, records, and memoranda of the carriers and subsidiaries. If, in any instance, a committee has not acted with respect to any matter which the Coordinator has brought to its attention and upon which he is of the opinion that it should have acted under the provisions of Section 5, he is hereby auth-

orized and directed to issue and enforce such order giving appropriate directions to the carriers and subsidiaries subject to the Interstate Commerce Act as amended, with respect to such matter as he shall find to be consistent with the public interest.

(b) In so far as may be necessary for the purposes of this title, the Commission and the members and examiners thereof shall have the same power to administer oaths and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents and to take testimony by deposition relating to any matter under investigation as though such matter arose under the Interstate Commerce Act, as amended and supplemented, and any persons subpoenaed or testifying in connection with any matter under investigation under this title shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as are provided in the case of persons subpoenaed or testifying in connection with any matter under investigation under the Interstate Commerce Act, as amended.

SEC. 7. (a) A labor committee for each regional group of carriers may be selected by those railroad labor organizations which, as representatives duly designated and authorized to act in accordance with the requirements of the Railway Labor Act, entered into the agreements of January 31, 1932, and December 21, 1932, with duly authorized representatives of the carriers, determining the wage payments of the employees of the carriers. A similar labor committee for each regional group of carriers may be selected

by such other railroad labor organizations as may be duly designated and authorized to represent employees in accordance with the requirements of the Railway Labor Act. It shall be the duty of the regional coordinating committees and the Coordinator to give reasonable notice to, and to confer with, the appropriate regional labor committee or committees upon the subject matter prior to taking any action or issuing any order which will affect the interest of the employees, and to afford the said labor committee or committees reasonable opportunity to present views upon said contemplated action or order.

(b) The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the payrolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the payrolls after the effective date of this Act by reason of death, normal retirements, or resignation, but not more in any one year than 5 per centum of said number in service during May, 1933; nor shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.

(c) The Coordinator is authorized and directed to establish regional boards of adjustment whenever and wherever action taken pursuant to the authority conferred by this title creates conditions that make necessary such boards of adjustment to settle controversies between carriers and employees. Carriers

and their employees shall have equal representation on such boards of adjustment for settlement of such controversies, and said boards shall exercise the functions of boards of adjustment provided for by the Railway Labor Act.

(d) The Commission is authorized and directed to provide means for determining the amount of and to require the carriers to make just compensation for property losses and expenses imposed upon employees by reason of transfers of work from one locality to another in carrying out the purposes of this title.

(e) Carriers, whether under control of a judge, trustee, receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act and with the provisions of paragraphs (n), (p), and (q) of the Act approved March 3, 1933, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto."

SEC. 5. Any order issued by the Commission pursuant to this title shall be made public in such reasonable manner as he may determine and shall become effective as of such date not less than thirty days from the date of such publication as the Commission shall prescribe in the order and shall remain in effect until it is suspended or set aside by the Commission or until it is terminated by the lawful authority, as hereinafter provided. Any such order may include provision for the transition to the requirements of such just provisions or arrangements

for such just compensation for the use of property or for carrier services as he may deem necessary or desirable and in furtherance of the purposes of this title

SEC. 9 Any interested party, including, among others, any carrier, subsidiary, shipper, or employee, or any group of carriers, shippers, or employees, or any State commission, or the Governor of any State, or the official representative or representatives of any political subdivision thereof, dissatisfied with any order of the Coordinator may, at any time prior to the effective date of the order, file a petition with the Commission asking that such order be reviewed and suspended pending such review, and stating fully the reasons therefor. Such petitions shall be governed by such general rules as the Commission may establish. If the Commission, upon considering such petition and any answer or answers thereto, finds reason to believe that the order may be unjust to the petitioner or inconsistent with the public interest, the Commission is hereby authorized to grant such review and, in its discretion, the Commission may suspend the order if it finds immediate enforcement thereof would result in irreparable damage to the petitioner or work grave injury to the public interest, but if the Commission suspends an order, it shall expedite the hearing and decision on that order as much as possible. Thereupon the Commission shall, after due notice and a public hearing, review the order and take such action in accord with the purposes of this title as it finds to be just and consistent with the public interest, either confirming the order or setting it aside or reissuing it in modified form, and any order

so confirmed or reversed shall thereafter remain in effect until vacated or modified by the Commission.

SEC. 10 (a) The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the anti-trust laws, as designated in Section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, insofar as may be necessary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however*, That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

(b) The Coordinator shall issue no order which shall have the effect of relieving any carrier or subsidiary from the operation of the law of any State or of any order of any State commission until he has advised the State commission of said State, or the Governor of said State if there be no such commission, that such order is in contemplation, and shall afford the State commission or Governor so notified reasonable opportunity to present views and information bearing upon such contemplated order, nor unless such order is necessary, in his opinion to prevent or

remove an obstruction to or a burden upon interstate commerce.

SEC. 11. Nothing in this title shall be construed to relieve any carrier from any contractual obligation which it may have assumed, prior to the enactment of this Act, with regard to the location or maintenance of offices, shops, or roundhouses at any point.

SEC. 12. The willful failure or refusal of any carrier or subsidiary or of any officer or employee of any carrier or subsidiary to comply with the terms of any order of the Coordinator or of the Commission made pursuant to this title shall be a misdemeanor, and upon conviction thereof the carrier, subsidiary, or person offending shall be subject to a fine of not less than $1,000 or more than $20,000 for each offense, and each day during which such carrier, subsidiary, or person shall willfully fail or refuse to comply with the terms of such order shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom the Coordinator or the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this title and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expense of the courts of the United States: *Provided*, That nothing in this title shall be construed to require any employee or officer of any carrier to render labor or service without his consent, or to authorize the issuance of any orders requiring such service, or to

make illegal the failure or refusal of any employee individually, or any number of employees collectively, to render labor or services.

SEC. 13. It shall further be the duty of the Coordinator, and he is hereby authorized and directed, forthwith to investigate and consider means, not provided for in this title, of improving transportation conditions throughout the country, including cost finding in rail transportation and the ability, financial or otherwise, of the carriers to improve their properties, and furnish service and charge rates which will promote the commerce and industry of the country and including, also, the stability of railroad labor employment and other improvement of railroad labor conditions and relations; and from time to time he shall submit to the Commission such recommendations calling for further legislation to these ends as he may deem necessary or desirable in the public interest. The Commission shall promptly transmit such recommendations, together with its comments thereon, to the President and to the Congress.

SEC. 14. The expenses of the Coordinator except so far as they are borne by the Commission in accordance with the provisions of Section 2, but not including the expenses of the coordinating committees, shall be allowed and paid, on the presentation of itemized vouchers therefor approved by the Coordinator, out of a fund obtained from assessments on the carriers, and said fund is hereby appropriated for the payment of such expenses. It shall be the duty of each carrier, within thirty days after June 16, 1934, to pay into this fund, for the second year of the operation of this

title $2 for every mile of road operated by it on December 31, 1933, as reported to the Commission, and it shall be the duty of the Secretary of the Treasury to collect such assessments. Any amount remaining in the fund when this title ceases to have effect shall be returned by the Secretary of the Treasury to the carriers in proportion to their contributions. The carriers and the Pullman company shall be permitted anything in the Interstate Commerce Act, as amended, to the contrary notwithstanding, to provide free transportation and other carrier service to the Coordinator and his assistants and agents and to the employees of the Commission when engaged in the service of the Coordinator.

SEC. 15. The Commission shall not approve a loan to a carrier under the Reconstruction Finance Corporation Act, as amended, if it is of the opinion that such carrier is in need of financial reorganization in the public interest: *Provided, however*, That the term "carrier" as used in this section shall not include a receiver or trustee.

SEC. 16. Any final order made under this title shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under the Interstate Commerce Act, as amended. The provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913 (38 Stat. L. 219), shall be applicable to any proceeding in court brought to suspend or set aside any order of the Coordinator or of the Commission entered pursuant to the provisions of this title.

Sec. 17. This title shall cease to have effect at the end of one year after the effective date, unless extended by a proclamation of the President for one year or any part thereof, but orders of the Coordinator or of the Commission made thereunder shall continue in effect until vacated by the Commission or set aside by other lawful authority, but notwithstanding the provisions of section 10 no such order shall operate to relieve any carrier from the effect of any state law or of any order of a state commission enacted or made after this title ceases to have effect.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 295.

LEGH R. POWELL AND HENRY W. ANDERSON,
RECEIVERS OF SEABOARD AIR LINE
RAILWAY COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

BRIEF FOR H. D. POLLARD, RECEIVER OF CENTRAL OF GEORGIA RAILWAY COMPANY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 295.

LEIGH R. POWELL AND HENRY W. ANDERSON,

RECEIVERS OF SEABOARD AIR LINE

RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

STATEMENT OF THE CASE.

Fort Benning is a military reservation of about 98,000 acres. The inhabited portion of the reservation is about 10 miles from Columbus, Georgia. It is the seat of the Infantry and Tank Schools of the Army and has a population of approximately 7,500. (R. 221, 229, 11).

Seaboard Air Line Railway and Central of Georgia Railway cross each other at a point known as Fort Benning Junction 6.8 miles from the inhabited portion of the reservation which is known as Fort Benning. Fort Benning Junction is 4 miles southwest from Columbus. The line of railroad which extends from

railroad as a common carrier, and that when the Fort Benning Railroad should be authorized to function as a common carrier Page and Harris would use their best endeavors to make the rates to and from Fort Benning as low or lower than the rates theretofore applied to and from Fort Benning Junction, and until this arrangement could be accomplished, the War Department would pay to Page and Harris $5.00 per loaded car for their services between Fort Benning and the Junction. Under this contract the Government further agreed to pay Page and Harris $1,000.00 per month to do the intra reservation switching at the Fort.

The scheme evidenced by these two contracts was that the Government would eliminate the arbitraries between Fort Benning and Fort Benning Junction, and that Page and Harris would compensate themselves for their services in hauling the traffic between Fort Benning and Fort Benning Junction and for maintaining the Railroad by procuring a division from the main line carriers of the through rates to and from Fort Benning Junction. In order to make this scheme practicable and workable, it was necessary to get the cooperation of one of the main line carriers. The Receivers of the Seaboard fell in with the plan and Charles R. Capps, Chief Traffic Officer of the Receivers of the Seaboard agreed with Page and Harris that when the Fort Benning Line acquired a common carrier status the Receivers of the Seaboard would join with it in making the rates to and from Fort Benning proper the same as to and from Fort Benning Junction, and thus the War Department would be relieved from paying the arbitraries between the Junction and the Fort; and at the same time it was agreed that the Seaboard would concede to the Fort Benning Line on coal a division of fifty cents out of the rate of $1.42 and on refined petroleum products from

[illegible] annuals on third [illegible] and that [illegible] divisions could be made on other commodities [illegible]

Page and Harris in accordance with the provisions [illegible] entered with the Government proposed a charter [illegible] the laws of the State of Texas for the Red Rooming [illegible] company [illegible] and in the name of this [illegible] application was made to the Interstate [illegible] Certificate of Public Convenience and Necessity to operate the Red Rooming [illegible] This application is known [illegible] and a certified copy of [illegible] proceedings in this proceeding is contained [illegible]

[illegible] Railway Company and H. H. [illegible] Texarkana appeared before the Commission [illegible] to the granting of the certificate [illegible] Texarkana Railroad Company [illegible] [illegible] the Texarkana while technically not [illegible] before the Commission supported the [illegible] Railroad before the Commission [illegible] of their Chief Traffic Officer and [illegible] Railroad had previously agreed [illegible] Harris upon the divisions which would [illegible] through traffic if the certificate

[illegible] the application of Red Rooming [illegible] Company for the Certificate of Public [illegible] Necessity on October 4, 1938. R. [illegible] the Certificate was put on the [illegible] Red Rooming Railroad Company was [illegible] common carrier, the revenues of [illegible] would be seriously depleted. R. [illegible] for the benefit of the War Department [illegible] that Page and Harris, although

they had no substantial investment in the property and estimated that their common carrier earnings would be about $40,000 per annum for the short movement between the reservation and the Junction (R. 200), all of which would come out of the pockets of the distributing agencies if the Certificate should be granted.

The Fort Benning Railroad Company applied for a rehearing November 10, 1939, which was denied by the Commission December 11, 1939 (R. 208).

In order to circumvent the decision of the Commission in the Fort Benning case, the Executive of the Seaboard filed their so-called Reciprocal Switch Tariff November 13, 1939, effective December 4, 1939 (R. 29 A), which reads as follows: "Switching at Fort Benning Junction, Ga. Reciprocal Switching at Fort Benning Junction, Ga., switching [illegible] the receiving and delivering tracks of the Fort Benning Military Post."

February 20, 1934, R. D. Pollard, Executive of the Central, brought his complaint before the Interstate Commerce Commission against the Executive of the Seaboard and Page and Harris and prayed [illegible] the above state switching tariff of the Executive of the Seaboard may be declared unlawful [illegible] and that the Executive be required to establish [illegible] Page and Harris were exercising for Fort Benning [illegible] contrary to the order of the Commission in Docket 27709, and that they be ordered to cease and desist therefrom. (8) That the Commission will find and adjudge that the arrangements between the Executive of the Seaboard and Page and Harris constitute a plan or device to evade and set at naught the said order of the Commission. (9) That the Commission will investigate the relations between the Executive of the Department of War Department, and Page and Harris with reference

to the operation of the Fort Benning Line; (5) other and further relief as might be proper in the premises. This proceeding before the Commission is known as "Docket 26483" (R. 84-181).

There should be considered in connection with the Switching Tariff of the Receivers of the Seaboard, an Agreement dated June 7, 1934, between the Receivers of the Seaboard and Page and Harris (R. 21). In this agreement Page and Harris agree to switch over the Fort Benning Line all traffic moving via the Seaboard, and in this matter to act as the Agent of the Receivers of the Seaboard and to comply with all tariffs, laws, rules and regulations to which the Receivers would be subject if they were performing such services; the compensation to be paid to Page and Harris by the Receivers of the Seaboard being $12.50 per car in either direction (excepting empties), but if the revenue of the Receivers from any carload is less than $25.00 the compensation to Page and Harris is to be 50% of the gross revenue of the Receivers from such carload. This contract provides in the 13th paragraph that it "shall be retroactive and shall be in force and effect from and after December 4, 1933," which is the date when the switching tariff went into effect. As a matter of fact the Receivers of the Seaborad from the time this switching tariff went into effect absorbed the $12.50 per car for the transportation between the Fort and the Junction (R. 113). The obvious effect of these arrangements was that the Fort Benning Line was doing the very thing which the Commission decided in Finance Docket 9709 was contrary to the public interest. The War Department acquiesced in and encouraged the efforts to set at naught the decision of the Commission.

As bearing further upon the plan to circumvent the order of the Commission denying the Fort Benning

line common carrier status, attention is called to the following facts:

(1). December 21, 1933, Page and Harris wrote a letter to the Quartermaster at Fort Benning that they proposed to charge shippers of commercial freight over the Fort Benning Railroad $12.50 per car. This was entirely unauthorized by the contracts between Page and Harris and the War Department. The Commandant at Fort Benning forwarded the announcement to the War Department and endorsed on it: "It is recommended that sympathetic consideration be given to the announced intention of the Fort Benning Railroad to make such a charge and to take such measures for relief as may be legal and just" and this recommendation was approved by the Quartermaster General. (R. 173, Exhibit 45.)

(2). January 4, 1934, Page and Harris issued a circular (R. 81, 176) that they were not operating the Fort Benning Line as a common carrier but entirely as private contractors, and that they would charge $12.50 per car for all cars transported between the Junction and the Fort-manufacturing establishments of Georgia, and for less than carload lots under 10,000 pounds, 12½ cents per hundred pounds with a minimum charge of 25 cents for any lot. The circular did not state that the charge of Page and Harris would be on traffic moving by the Seaboard, except that there would be a charge of $5.00 per car from the "Receiving and Delivery tracks" at the Fort to any existing location. The reason for this was that Page and Harris were being paid by the Receivers of the Seaboard $12.50 for all Seaboard traffic moving between the Junction and the Fort and shippers via the Seaboard were relieved of this charge. R. 118, 119.

3. January 11, 1934, Page and Harris forwarded to the War Department a proposed supplement to their

4. The hearing on the complaint of the Receivers of the Central against the tariff of the Receivers of the Seaboard was had before the Director of Service of the Commission June 14, 1904 (R. 21). June 8, 1904, Harry H. Woodring, Acting Secretary of War, wrote a letter to the Chairman of the Interstate Commerce Commission, in which he stated: "From all available information, it is believed that the complaint of the Central of Georgia Railway Company is without merit, and that the evidence which will be produced at the hearing at Atlanta, Georgia, on June 14, 1904, will urge the conclusion that the present switching arrangements at Fort Benning should not be disturbed." (Exhibit 44, R. 176.)

The result of the application of the tariff of the Receivers of the Seaboard and their arrangements with Page and Harris is that on all freight moving via the Seaboard and destined to or originating at Fort Benning the Receivers of the Seaboard absorb, and pay to Page and Harris $12.50 per car, or one-half of their revenue if the revenue is less than $25.00, and shippers of such freight are relieved from paying such charges of Page and Harris, whereas on the other hand, shippers of traffic via the Central of Georgia destined to or originating at Fort Benning must pay to Page and Harris $12.50 per car. The effect of this is that on all commercial freight destined to or originating at Fort Benning that is competitive between the Seaboard and the Central, the shipper pays $12.50 less if his shipment moves via the Seaboard than if his shipment moves via the Central. The amount of freight so affected is very large and has been abnormally large ever since the Seaboard's tariff has been in effect, on account of the large amount of construction work in progress at Fort Benning. (R. 12.)

The revenue which Page and Harris receive from the transportation of freight over the Fort Benning lines goes into their own pockets and is not accounted for by them to the Government. The provision of the contract between Page and Harris and the Government, whereby Page and Harris were to be paid $5.00 per car by the War Department for all freight transported by them between Fort Benning Junction and the Fort, has been entirely departed from.

Shortly after the tariff of the Receivers of the Seaboard went into effect, the War Department advised the Receiver of the Central of Georgia Railway that the Receivers of the Seaboard were absorbing as to traffic moving via the Seaboard, the charges of Page and Harris on all Government freight moving between Fort Benning Junction and the Fort, and that unless the Receiver of the Central of Georgia Railway was prepared likewise to absorb the charges of Page and Harris on Government freight, that the War Department would not route any of its Fort Benning freight via the Central of Georgia Railway, and in consequence of this threat on the part of the War Department, and in order to participate in the hauling of the Fort Benning Government freight, the Receiver of the Central of Georgia Railway was compelled to pay to Page and Harris $12.50 on all Government freight moving in car load lots and one half of its revenue if the revenue was less than $25.00. The War Department sought to apply this arrangement also to traffic moving on commercial bills of lading consigned to the Government at Fort Benning, but on the insistence of the Receiver of the Central of Georgia Railway, that he could not lawfully absorb Page and Harris' charges on this class of traffic, the War Department finally conceded the contention of the Receiver of the Central of Georgia

in this matter and the Central does not absorb any charges of Page and Harris on traffic moving on commercial bills of lading consigned to the Government, but the Government pays Page and Harris $5.00 per car for handling such traffic (Exhibit 1 21, R. 141 155). The Receiver of the Central can lawfully absorb Page and Harris' charges on strictly Government freight under the provisions of paragraph 1 of §22 of the Interstate Commerce Act which authorizes transportation for the Government at free or reduced rates.

After hearing the complaint of the Receiver of the Central against the Receivers of the Seaboard and Page and Harris, the Interstate Commerce Commission passed its order dated February 5, 1935, holding the switching tariff of the Receivers unlawful and ordering it stricken from the files of the Commission. (R. 19.)

The Receivers of the Seaboard then brought their bill of complaint against the United States of America to annul and set aside the order of the Commission of February 5, 1935. (R. 1.)

A court of three Judges was convened to hear the complaint, consisting of Honorable Samuel H. Sibley, Circuit Judge, Honorable William H. Barrett, District Judge and Honorable Bascom S. Deaver, District Judge. (R. 40.)

The Interstate Commerce Commission and H. D. Pollard as Receiver of Central of Georgia Railway Company entered their appearances as Defendants in accordance with Section 212 and 213 of the Judicial Code. (R. 44, 48.)

The United States demurred to the bill and also filed an answer. (R. 41.) The Interstate Commerce Commission answered the bill (R. 43). H. D. Pollard as Receiver of the Central filed an answer to the bill and

counter claim (R. 40). The Receivers of the Seaboard moved to strike the counter claim of H. H. Dollard, Receiver (R. 40).

The cases having come on to be heard before the District Judge, it was agreed by counsel that the motion to strike out the counter claim should not be granted at once, but that it was agreed between the parties that the hearing should be both on the merits and final and that the Court should render a final decree in the case (R. 291).

The Receivers of the Seaboard plaintiff in the main suit presented an answer to the counter claim of the Defendant H. H. Dollard, Receiver, without prejudice to their motion to strike the counter claim, and it was agreed that the Court would consider the main case, the counter claim and the motion to strike the counter claim together and that the evidence introduced before the Master would be applicable to the counter claim as well as the main case (R. 291).

[illegible] the Judges (Judges Barrett and Deaver) [illegible] the report of the Commission of February 5, 1923, sustaining the switching tariff of the Receivers of the Seaboard was lawful and valid, and granted an injunction against the counter claim of the Receivers of the Seaboard (R. 82).

[illegible] reversed, holding that the order of the Commission was not supported by the facts found by it, and it is further held that the counter claim be dismissed (R. 339).

The Receivers of the Seaboard have appealed to this Court from the order of the District Court, sustaining the validity of the said order of the Commission, and the Receivers of the Seaboard on the counter claim.

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I.

THE DENIAL BY THE COMMISSION IN FINANCE DOCKET 9709 OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO FORT BENNING RAILROAD COMPANY.

The decision of the Commission in Finance Docket 9709 (193 I. C. C. 223; 193 I. C. C. 517; (R. 220, 229) turns on the facts that Page and Harris had practically no investment in the Fort Benning Railroad and that they were proposing to use the Fort Benning Line as a means to cut the rates of the main line carriers, so that the Government would get its freight hauled from Fort Benning Junction to the Fort for nothing, and that through the means of divisions out of the through rates, Page and Harris would enrich themselves out of the pockets of the main line carriers. The Seaboard, while technically not parties to this proceeding before the Commission, were privies to the proceeding. Without the agreement of the Seaboard to a division of the through rates, the whole scheme would have been abortive. The Chief Traffic Officer of the Seaboard was the principal witness for the Applicant before the Commission.

II.

THE DECISION OF THE COMMISSION IN DOCKET 26483 STRIKING THE TARIFF OF THE SEABOARD FROM ITS FILES.

This decision is reported in 206 I. C. C. 362 and also is copied in the Record (R. 9).

While the Commission held that the Seaboard was operating over the Fort Benning line as a common carrier without any Certificate of Public Convenience and Necessity contrary to Section 1 (18) of the Interstate Commerce Act, the Commission did not rest its

decision on this proposition. The basis of the decision of the Commission is contained in these extracts from its report:

"(1). Consideration has been given to the contention of the parties, but the tariff is unlawful on other grounds * * *. By the tariff under consideration the Seaboard undertook to extend the switching district of Fort Benning Junction to include the receiving and delivery tracks at Fort Benning. A carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be served by other common carriers through switching arrangements or otherwise";

"(2). Our finding of unlawfulness of the tariff here under consideration, therefore, is not predicated on the fact that the Seaboard has violated Section 1 (18), but rather on the fact that it has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier, and consequently it cannot pay out of its line haul rates for a service which it is not legally obligated to perform and which it cannot perform, except through the employment of the Contractors with the Government. A remedy for a violation of Section 1 (18) is provided under Section 1 (20)."

"(3). Upon consideration of the record, we find that the Seaboard tariff which extends the Fort Benning Junction switching district to include the receiving and delivery tracks at Fort Benning is unlawful in violation of Section 6 of the Act and should be stricken from the files of the Commission."

We contend elsewhere in this brief that the tariff of the Seaboard was an unlawful tariff also because

through the tariff the Seaboard was violating Section 1 (18) of the Act. But, for the present, we maintain that the decision of the Commission that the tariff was a violation of Section 6 of the Act is fully supported by the law and the facts.

The Appellants complain that the Commission did not specify what portion of Section 6 of the Act was violated; that this Section contains 13 paragraphs. It is obvious from what the Commission said in connection with its statement that the tariff was a violation of Section 6, that it necessarily referred to paragraphs 1, 4, and 7, of Section 6, because all the other paragraphs of Section 6 of the Act are totally irrelevant.

With reference to the contention of Appellants that the Commission is without power under the Interstate Commerce Act to strike the tariff from its files, it seems to us that there is nothing substantial in this point. The Commission in its order pronounced the tariff unlawful, and then followed this portion of its order with the provision that the tariff should be "stricken from the files of this Commission." The order of the Commission pronouncing the tariff unlawful, killed the tariff. The Seaboard could not use the order any further after it was declared unlawful. The Commission has power under Section 15 (7) of the Act to investigate the unlawfulness of the rate, and under Section 15 (1) of the Act it can pass a cease and desist order, and under Section 1 (6) of the Act every unjust and unreasonable practice is prohibited and declared unlawful. In view of the undoubted power of the Commission, it seems to us that it was appropriate to order the tariff stricken from the files of the Commission.

III.

SECTION 6 OF THE ACT TO REGULATE COMMERCE.

The applicable portions of this Section are as follows:

Section 6 (1). "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all of the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid the separate rates, fares, and charges applied to the through transportation."

Section 6 (3). "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such concurrences or rejections with reference thereto as may be required from time to time by the Commission."

Section 6 (7). "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property as defined in this Act unless the rates, fares and charges upon which the same are based have been filed and published in accordance with the provisions of this Act," etc.

Three principles are inherent in the above quoted provisions of Section 6 of the Act.

1. Carriers subject to the Act must file tariffs covering any transportation in which they engage. A carrier which is not subject to the Act cannot file a tariff with the Commission. This is manifestly so because the Commission has no control over carriers not subject to the Act.

2. It follows from the first proposition that a carrier subject to the Act cannot enter into joint or through arrangements with a carrier not subject to the Act, because the Commission would have no control over the rates of the carrier not subject to the Act.

3. A carrier subject to the Act cannot absorb the charges of the carrier with which it connects, which latter carrier is not subject to the Act, for two reasons: first, because the absorption would be a departure from the only tariff which could be lawfully filed, and secondly, if the absorption could be made it would be equivalent to making through rates and joint arrangements with a non-common carrier.

IV.

THE SERVICE PERFORMED BY PAGE AND HARRIS IN CONJUNCTION WITH THE TARIFF OF THE SP. BOARD IS NOT SWITCHING SERVICE BUT LINE HAUL SERVICE, AND PAGE AND HARRIS ARE NOT COMMON CARRIERS SUBJECT TO THE ACT.

Both the Commission and the District Court found that the transportation between Fort Benning and Fort Benning Junction was a line haul service and not mere switching service. The Commission found (R. 14):

> "We are of the opinion and find that the operation of the line between Fort Benning Junction and Fort Benning falls under the provisions of Section 1 (18) of the Act and that before the Seaboard could lawfully operate the line in question a Certi-

rate of Conveyance and Necessity would first have to be obtained.

The District Court found (R. 333):

"The Port Benning Line was organized by Hugo and Harris not as a common carrier but as a contractual carrier or cut off of one of the lines of railroad. The line from Port Benning [illegible] Port Benning is not a spur, industrial switching or side track as defined in Section 1 (22), of the Interstate Commerce Act. The [illegible] Port Benning is a line haul [illegible] the Southern [illegible] operate, and is [illegible] tariff as a line haul carrier.

The [illegible] Port Benning [illegible] and from [illegible] in the [illegible]

The Court [illegible]

"[illegible] Harris [illegible] that [illegible] Port Benning [illegible] being [illegible] line haul [illegible]

We submit [illegible] which [illegible] lawfully [illegible] ning Line [illegible] Benning Line [illegible] ing Line.

There [illegible] mon carrier [illegible] charges [illegible]

to perform terminal services for them. But these cases all relate to a situation where a carrier subject to the Act is required under the law to perform such services and where they are in truth and in fact switching or terminal services. There is no purpose in this case that the Seaboard is under any obligation to carry over the Fort Benning Line. It is like cases at Fort Benning Junction. Moreover the services which the Seaboard is performing through their agents Page and Harris over the Fort Benning Line are not switching or terminal services and both the Commission and the District Court have so found.

Judge Sibley in his dissenting opinion in the Dist ict Court said, referring to the statement of the Interstate Commerce Commission (R. 2401):

> "The statement that a carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be used by other common carriers through switching movements, or otherwise will not support the order. The first clause is bad in law, for carriers daily and everywhere switch over privately owned tracks. If they are going to do so, the Act merely requires that the shall tariff to state with the charge to be made for the service. The last clause is also wrong in fact, for the proof and the finding of the Commission are that the other common carrier, the Central, can if it wishes make the same switching arrangements which the Seaboard has."

The passage from the report of the Commission quoted by Judge Sibley must be taken in connection with what the Commission had previously said, which was to the effect that the haul over the line from Fort Benning Junction to Fort Benning was not switching

service but was a line boat was for and that the Post was not a terminal of the Steamboat & service as frequently quite were privately owned trucks but they only de as within their terminal delivery district they do not see any reference in the last stated by the District Judge that the Central could have made the same switching arrangements with Page and Hanson that the Steamboat had made. It could not have been fully done we may more that the Steamboat could have done so. The point is that the Steamboat switching arrangements were unlawful

7.

PAGE AND HARRIS WAS BEING A COMMON CARRIER SUBJECT TO THE I.C. THE CENTRAL DID NOT LAWFULLY AND REASONABLY REFUSE TO MAKE JOINT RATES OR THROUGH ROUTES WITH PAGE AND HARRIS BECAUSE THEY WERE NOT SUBJECT TO THE I.C.

The Commission has expressed no opinion as to the question whether the Central was under a duty to establish joint rates and through routes with Page and Harris. The Commission has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. It has not found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. It has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. (1) It has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. (2) It has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. (3) It has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. The Commission has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. It

any joint rates or through arrangements or absorptions with carriers not subject to the Act.

> Tariffs Embracing Motor Truck or Wagon Transfer Service, 91 I. C. C. 539, 546, 548, 549.

The Commission reaffirmed its decision in the above case and said (referring to the above case):

> "In that case we held that we have no jurisdiction over service by a motor carrier which extends beyond terminal districts and becomes what is commonly designated as a line-haul and in effect acts as an extension of the lines of rail or water carriers. We also held that where a motor carrier performs a line-haul service it is not a proper party to a joint tariff and that joint rates cannot be made between such motor carrier and carriers subject to the act."

> Motor Bus and Motor Truck Operation, 140 I. C. C. 685, 729.

Southwest Missouri Railroad published a tariff absorbing drayage charges on ore from the mines to its line. This absorption was paid for the purpose of diverting the ore from the lines of the Miami Mineral Belt and Northeast Oklahoma Railroad which were nearer the mines. The Commission held that this tariff was nothing more or less than a rebate to the shippers although it was paid direct to the teamsters. The tariff was otherwise in violation of Section 6 of the Act.

> Drayage Absorptions by S. W. M. R. Co., 113 I. C. C. 179.

Northern Pacific Railway Company entered into through arrangements with a stage transportation company and a hotel association, with reference to passengers going to the Yellowstone National Park. The Commission held:

"That the defendant railway company, stage transportation company, and hotel association, are not competent in law to form through routes and establish joint rates as provided in section 6 of the act to regulate commerce, and the circular or tariff under which the rates and tickets in question are provided cannot be regarded as a joint tariff established by connecting carriers under that Act."

Wylie v. Northern P. R. Co., 11 I. C. C. 145.

The New York Dock Railway was a common carrier under the Act and operated 10.62 miles of track on the Brooklyn water front. The New York Dock Railway petitioned the Commission to grant it a larger division out of the through rates than it was enjoying. The Commission found that the Dock Railway was not a party to the joint rates, but that the Dock Railway received a certain amount from the trunk lines for the services performed by it, which amount was deducted from the through rate before prorating, the balance being divided among the other interested carriers on the basis of their established divisions. On this state of facts the Commission held:

"As hereinbefore noted, the trunk lines provide for allowances to the dock company for services performed by the dock railway. The amounts, however, actually are paid to the dock railway. The trunk lines are therefore publishing rates to and from stations which are not on their lines and which cannot be reached by any line which is a party to their tariffs or by any carrier to which an allowance for service beyond the eastern termini of the trunk lines is lawfully provided. Obviously this is in violation of the requirments of the law and our regulatons with respect to the publication of rate schedules."

N. Y. Dock Ry. v. B. & O. R. R. Co., 73 I. C. C. 656.

VI.

THE PRACTICAL EFFECT OF THE SEABOARD'S SWITCHING TARIFF IS THAT THE SEABOARD MAKES THROUGH RATES TO FORT BENNING PROPER.

The shipper under this arrangement gets his traffic to Fort Benning proper and pays only the rates established by the Seaboard tariffs up to Fort Benning Junction. The $42.50 per car charged by the Fort Benning line is absorbed by the Seaboard and through its switching tariff the Seaboard has the traffic delivered at Fort Benning proper on the the Fort Benning Junction rate.

> "It seems plain to us that the tariffs above mentioned, the joint tariff of the line carriers and the switching tariff of the defendant, are to be taken and read together; they are intended to supplement each other and their practical and legal effect is the same as one publication naming the aggregate rate from the Lehigh coal field to industries in Utica on the tracks of the Ontario & Western."
>
> Utica Traffic Bureau v. N. Y., O. & W. Ry. Co., 18 I. C. C. 168, 171.
>
> "So far as the shipping public is concerned the effect of a switching absorption is to establish a joint rate."
>
> Butterfield Co. v. N. O. & N. E. R. Co., 55 I. C. C. 741, 743.
>
> "So far as the shipping public is concerned the effect of a switching absorption is to establish a joint rate; the cancellation of an absorption is the withdrawal of a joint rate, leaving effective the higher aggregate of intermediate rates."
>
> National Dock & Storage Whse. Co. v. B. & M. R. Co., 38 I. C. C. 643, 650.
>
> See also:
> Switching Absorptions, 47 I. C. C. 583.

VII.

THE SEABOARD COULD NOT LAWFULLY ABSORB THE LINE HAUL CHARGES OF ANOTHER CARRIER. THE ESTABLISHMENT OF THROUGH RATES IN THIS MANNER IS UNLAWFUL.

Even assuming that the Fort Benning line is a carrier subject to the Act (which it clearly is not), the Seaboard could not absorb the local transportation charges of the Fort Benning line because the service which the Fort Benning line is performing is not switching or terminal service. The service is line-haul service.

> "While it is proper for the line-haul carrier to absorb the terminal or switching charges of a connecting line it may not absorb its local transportation charges in the manner indicated above."

Chestnut Ridge Ry. Case, 37 I. C. C. 558, 562.

To the same effect, see:

Atlantic Refining Co. v. Director Gen., 64 I. C. C. 61.

The Stony Fork Branch of the L. & N. Railroad runs from Stony Fork, where it connects with the Southern Railroad, a distance of 8.98 miles. A dispute arose between the Southern Railway and the L. & N. as to which one should furnish cars for the coal traffic originated on the Stony Fork Branch. The L. & N. proposed to cancel joint rates on coal from points on the Stony Fork Branch of the L. & N. Railroad to Southeastern territory and to substitute in the place thereof switching rates, which switching rates the Southern Railway proposed to absorb. The Commission held:

> "The method of publishing rates from the Stony Fork Branch to the southeast, as proposed in suspended schedules, would, under the circumstances

of this case, be improper. This is evident when we consider that the movement from Stony Fork Branch mines to Middlesboro is not a switching movement and that consequently the charge of the Louisville & Nashville is not such as may be properly absorbed by the Southern."

"There is no provision in the law for the establishment of through rates by absorbing the local rates of another carrier for the purpose of establishing through rates over a through route composed of two or more carriers over which through route no joint rate has been fixed by the agreement."

Coal Rates on the Stony Fork Branch, 26 I. C. C. 168.

The Great Northern refused to join in joint passenger rates with the C. M. & St. P. via Seattle. To off-set this disadvantage, the Milwaukee Company published a tariff, whereby it absorbed the rates paid by passengers travelling over the Great Northern to Seattle and thence from Seattle over the Milwaukee line. The Commission held that one carrier could not absorb a part of another carrier's charges, referring to its decision in coal rates on Stony Fork Branch, 26 I. C. C. 168, 173, and then the Commission said:

"There is no specific inhibition in the law against such absorptions, but tariff provisions and the practices thereunder must conform to the requirements of section 6 of the act and of the regulations which we are authorized to make thereunder. Such regulations are designed, among other things, to insure that tariffs shall state in specific, clear, and unambiguous terms the rates and fares and their application. The character of the provision which the Milwaukee has caused to be inserted in the tariffs, over the objection of the Great Northern, and the ob-

vious difficulty of conforming it to the strict requirements of the statute and our regulations, must lead to its condemnation."

C. M. & St. P. Ry. v. G. N. Ry. Co., 49 I. C. C. 302, 305, 306.

The Danville, Urbana & Champaign Railroad published a switching rate from Danville to Bronson, a distance of 8.9 miles, Bronson being the junction with the C. & E. I. Railroad. The C. & E. I. Railroad published a tariff providing for the absorption of the switching charge of the D. U. & C. The Commission held that although the charge was published as a switching charge, the transportation which the D., U. & C. rendered from Danville to Bronson was, in fact, a line-haul service, and, therefore, it could not be absorbed by the C. & E. I.

Commodity Rates on Brick from Danville to Bronson, 63 I. C. C. 277.

The Ligonier Valley Railroad extends from Ligonier, Pa., to Latrobe, where it connects with the Pennsylvania. It was held that the haul from Ligonier to Latrobe was a line-haul and not a switching movement, and that the absorption of the charges of the Ligonier Valley by the Pennsylvania was an *improper method of tariff publication.*

Barrett Co. v. D. G., 88 I. C. C., 535, 539, 540.

VIII.

THE APPROVAL BY THE WAR DEPARTMENT OF THE CONTRACT OF JUNE 7, 1934, DID NOT GIVE THE SEABOARD ANY RIGHT TO OPERATE OVER THE FORT BENNING LINE.

The approval by the War Department of the contract of June 7, 1934, does not appear in the evidence. It appears in the report of the Commission in Docket No.

26483 (R. 17). From the report of the Commission it will be seen that this approval by the War Department was subsequent to the hearing. The Commission disposed of this so-called approval of the contract as follows:

> "The Seaboard contends that by this endorsement the War Department has given approval to that Company to operate the Fort Benning Line whenever it so desires. We do not so construe it. The endorsement was an approval of the terms of the contract, but granted no rights to the Seaboard to operate over the track in question. Manifestly, the War Department could take no action on a subject-matter which the Congress has placed under our exclusive jurisdiction."

IX.

THE COURT WILL SUSTAIN THE ORDER OF THE COMMISSION, IF VALID FOR ANY REASON.

"In a suit by the Interstate Commerce Commission to enforce an order made by it, the Court is not confined in passing on the validity of the order to the reasons stated by the Commission." (last h. n.).

The Court said on page 556:

"The defendants object that the Circuit Court had no authority to decree the enforcement of the order upon any other ground than that taken by the Commission itself. We think that the Court was not confined to those grounds, and if it found that the rule was, in itself, for any reason illegal as a violation of the act, the order might be valid and be a lawful order, although the Commission gave a wrong reason for making it. If it held that the rule to be a violation of one section, the order to desist might be valid, if, instead of the section named by the Commission, the Court should find that the

rule was a violation of another section of the act. All of the facts being brought out before the Commission or the court, the court could decide whether the order was a lawful one, without being confined to the reasons stated by the Commission. We therefore look to see the ground taken by the Circuit Court."

Southern Pacific Co. v. I. C. C., 200 U. S. 536, 556, 557.

"In suit to enjoin operation of order of Interstate Commerce Commission directing plaintiffs to cancel certain proposed schedules theretofore filed with Commission, court must, if necessary, go behind reasons assigned by Commission or its counsel for making order, and determine for itself validity of order."

Wallower, et al. v. United States, 32 F. (2d) 524, 529.

"This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

Virginian Ry. Co. v. U. S., 272 U. S. 658, 665, 666.

X.

THE COMMISSION IS NOT CONFINED IN MAKING ITS ORDER TO THE CONTENTIONS OF THE PARTIES. ITS ORDER SHOULD HOWEVER BE GERMANE TO THE SUBJECT MATTER RAISED BY THE COMPLAINT.

The Commission has the power to investigate and hear any matter on its own initiative, without any complaint whatever; [Sections 13 (2) and 15 (1) of the Act]. Therefore, if its order relates to the subject matter of the complaint, the only question is whether the order is lawful. The Court is not concerned with the reasons.

Although the order may be technically outside the issues raised by the pleadings, the order is not invalid on that account, if it is germane to the subject matter.

New York Central & H. R. R. Co., v. I. C. C., 168 Fed. 131, 138.

The Appellants complain that the Commission put its order on a different ground from that urged by the Receiver of the Central. The Commission was at liberty to do that. The gravamen of the complaint was that the tariff was unlawful, and the complaint prayed that the relations between Page and Harris and the Seaboard should be investigated, and for such order as the Commission might consider proper in the premises. The complaint was filed shortly after the tariff went into effect and the Complainant had substantially no information as to the relations between Page and Harris and the Seaboard. The contract of June 7, 1934, which set forth the relations between Page and Harris and the Seaboard was not made until a week before the hearing before the Examiner of the Commission, although by the terms of the contract, it was retroactive to the effective date of the tariff.

XI.

THE TARIFF OF THE SEABOARD WAS CONTRARY TO SECTION 1 (18) OF THE ACT AND THE COMMISSION COULD HAVE PUT ITS DECISION ON THIS GROUND, AS WELL AS ON THE VIOLATION OF SECTION 6 OF THE ACT.

The Commission found (R. 14): "We are of the opinion and find that the operation of the line between Fort Benning Junction and Fort Benning falls under the provisions of Section 1 (18) of the Act, and that before the Seaboard could lawfully operate the line in question a certificate of convenience and necessity would first have to be obtained."

The Commission did not rest its decision upon this paragraph of its report, but rested it on Section 6 of the Act:

The Commission should have rested its decision not only on Section 6 of the Act, but also on the ground that the tariff was a violation of Section 1 (18) of the Act.

The proceeding before the Commission involved the legality of a tariff. The Seaboard instead of operating the Fort Benning line, resorted to the device of publishing a tariff extending its switching limits over the Fort Benning Line, and then making a contract with Page and Harris to do the physical switching for the Seaboard. The Commission pronounced this arrangement to be a virtual extension of the Seaboard Line over the Fort Benning Railroad without a certificate contrary to Section 1 (18) of the Act. The tariff is therefore contrary to Section 1 (18) of the Act. This section of the Act provides that "No carrier by railroad subject to the Act shall undertake the extension of its line of railroad * * * until there shall have first been obtained from the Commission a certificate, etc." Section 1 (20) of the Act provides that any carrier which violates Section 1 (18) of the Act shall be fined or imprisoned or both. Under Section 12 (1) of the Act "The Commission is hereby authorized and required to execute and enforce the provisions of this Act." Section 15 (1) of the Act provides, if anything is being done unlawfully and contrary to the Act, the Commission can issue a cease and desist order. Under the decision of the Commission there can be no doubt that the tariff was a violation of Section 1 (18) of the Act, and if the tariff was unlawful and invalid on this ground, the Commission had ample power and authority to rest its decision on this ground.

The Commission has initial and exclusive jurisdiction over tariffs.

> "The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated." (Citing a long line of cases).
>
> Director General of Railroads v. Viscose Co., 254 U. S. 498, 504.

It is apparent from the context of the Commission's report that it did not rest its decision in part on the violation of Section 1 (18) of the Act, because of the decisions of this Court in

> Texas & Pacific Railway Co. v. Gulf, Colorado & Sante Fe Railway Co., 270 U. S. 266.
>
> St. Louis S. W. R. Co. v. Missouri Pac. R. Co., 289 U. S. 76, 82.

These cases hold that where one railroad company has extended its line contrary to the Act, the exclusive remedy of another railroad company which objects, is an injunction under Section 1 (20) of the Act. There is nothing in these cases which militates against the proposition which we urge, that where a railroad company publishes a tariff which is a part of a scheme to extend its line contrary to the Act, that the Commission has power to denounce the tariff as unlawful because it is contrary to the Act in this particular. The Commission would thereby exercise its function, which is primary and exclusive, to deal with tariffs filed under the Act.

XII.

THE SEABOARD BY VIRTUE OF THE SWITCHING TARIFF AND THE CONTRACT OF JUNE 7, 1934, WITH PAGE AND HARRIS HAS EXTENDED ITS LINE OF RAILROAD TO FORT BENNING AND IS OPERATING THE FORT BENNING LINE CONTRARY TO SECTION 1 (18) OF THE ACT.

Section 1 (18) of the Act provides: "No carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate, etc."

It will be noted that this section relates not only to the extension of its line of railroad, but to the operation of a line of railroad and the engaging in transportation over such additional or extended line.

The Commission found (R. 13): "The fact that the Seaboard has by the tariff here considered extended its line over the government owned railroad to the fort is not open to question."

The contract of June 7, 1934, taken in connection with the tariff would seem to conclude the question that the Seaboard is operating over the Fort Benning line contrary to Section 1 (18) of the Act.

There are several cases which hold that where one railroad by trackage arrangements or otherwise utilized the line of another railroad, the case is within Section 1 (18) of the Act.

Transit Commission v. U. S., 289 U. S. 121, 128, 129.

Operation of line by Atchison, Topeka & Sante Fe Ry., 94 I. C. C. 318.

Railroad Commission v. Southern Pacific R. R., 264 U. S. 331.

Alabama Ry. v. Jackson Ry., 271 U. S. 244.

XIII.

THE FORT BENNING LINE IS NOT A SPUR, INDUSTRIAL, TEAM OR SIDETRACK WITHIN THE MEANING OF SECTION 1 (22) OF THE ACT.

The Commission found (R. 13, 14), that the case was not within Section 1 (22). The District Court found to the same effect (R. 338).

The evidence amply sustains the finding of the Commission and of the District Court.

(1) Fort Benning is not an industry and may more properly be described as a small city or town. It has a population of between 7500 and 8000, including officers and their families, enlisted men and their families, and civilian employees and their families. The inbound and outbound freight consists of the many articles necessary to the subsistence of the inhabitants and the equipment used in military activities, in addition to a large amount of building material used in connection with erecting permanent buildings. About one-half of the inbound shipments which total approximately 2800 carloads per year, are moved on Government bills of lading, the balance on commercial bills of lading. No industrial operations are conducted within the Reservation. (R. 14.)

(2). There are no stations on the Fort Benning line between the Junction and the Fort proper, (R. 255)

and no passenger business is conducted over this line. (R. 265.) The Central of Georgia, Seaboard, and the Southern Railway compete with each other for the business to and from Fort Benning. (R. 264.)

(3) When the line reaches the Fort there are a number of spur tracks which radiate to different parts of the inhabited portions of the Fort. (R. 221.) When the Central operated the line, intra-reservation switching was done by the War Department (R. 265); and regular line-haul rates were established between Fort Benning Junction and the Fort, which were carried in published tariffs (R. 276). The tariffs are contained in F. D. 9709, Exhibits 16, 17, 18 and 19 (R. 300-318). The rates contained in these tariffs were known as arbitraries (R. 224, 226, 277).

(4) The War Department when it made the contract with Page and Harris had no doubt about the character of the track, because in paragraph 1 of the operating contract between Page and Harris and the War Department it was provided that Page and Harris would organize the Fort Benning Railroad Company and apply to the Commission for a certificate.

(5) The following evidence of Page and Harris and of General Williams of the War Department shows that the service of the Fort Benning line was transportation and not mere switching service and that the switching service was the intra-reservation switching service at the Fort.

Answer 22 to Questionnaire (R. 203), states Fort Benning Line will afford "independent local carrier" service.

Answer 23 to Questionnaire (R. 203):

"This line is not an extension, branch, connecting track or cut off for any other line. It is expected to be directly profitable in itself."

Williams (R. 285):

"Two kinds of railroad service are essential to serve this community; first, between Fort Benning and the outside world; and, second, a local service from point to point within the Reservation."

Williams (R. 280):

"In fact, the Central of Georgia did not perform all of the railroad service, but merely brought the cars in, and it being necessary for the Government to maintain an engine and crew to perform the switching between the points on the Reservation not covered by the Central of Georgia contract."

Page (R. 255):

"The common carrier service between Fort Benning Junction and Fort Benning will consist of main line haul of approximately six miles between Fort Benning Junction and Fort Benning station, and also the customary placement and movement of the cars in common carrier service at the numerous unloading points within the Reservation * * * This is simply the placement which is customary out of line haul rates."

Harris (R. 259):

"Our operation at Fort Benning involves two types of service which can best be described as follows:"

Then the witness describes at great length the line haul service and the intra-reservation service.

(6) Under the contract between Page and Harris and the Government, Page and Harris are paid $1.00

a month to do the intra reservation switching at Fort Benning, and they make a charge of $12.50 to all shippers (except the Government) for hauling traffic between the Junction and the Post and thus distinguish between the line haul and the switching service.

(7) The Seaboard tariff establishes the point at Fort Benning described in the tariff as "switching and delivery track". This indicates where the line haul stops and the switching begins.

(8) The Seaboard tariffs all stop at Fort Benning Junction (R. 99).

The following authorities sustain this point:

"But if the purpose and effect of the new trackage is to extend, substantially, the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of par. 18, although the line is short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." (Par. 3)

"In determining what is an extension, the purpose of the Act to develop and maintain an adequate railway system, and thereby to curb wasteful competition and the building of unnecessary lines, is the important guide." (Par. 7)

Texas & Pacific Ry. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266, 273.

(Reversing the 5th Circuit Court of Appeals in Gulf C. & S. F. Ry. Co. v. Texas & P. Ry. Co., 6 F. (2d) 904, and affirming the decision of the District Court in Lancaster, et al., v. Gulf, C. & S. F. Ry. Co., 292 Fed. 668.

A line 3¾ miles long to state lands owned by a resort company.

Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co., 286 Fed. 540 (h. n. 2, 3).

A track 3700 feet long to reach a site for a proposed new freight station.

Mo. Pac. Ry. Co. v. Chi., R. I. & P. Ry. Co., 41 Fed. (2d) 188.

A track one mile in length to a coal shaft.

Marion & Eastern R. R. Co. v. Mo. Pac. Ry. Co. et al., 318 Ill. 436, (149 N. E. 402).

A track to be constructed by the Tampa Southern Railroad on a strip of land owned by the City to connect with other tracks previously constructed by the City for the purpose of affording the Tampa Southern Railroad access to water terminals owned by the City and to enable the Tampa Southern to provide transportation facilities for such industries as should be established and located adjacent to this strip of land.

Seaboard Air Line Ry. Co. v. Tampa Sou. R. Co., 97 Fla. 340, (121 So. 477).

The El Dorado and Western Railway proposed to construct a track 1500 feet across four tracks of the C. R. I. & P. Ry. Co. to connect with the track of the Missouri Pacific. The Court held that the purpose being to form a contract with the Missouri Pacific so as to compete with the C. R. I. & P. Railway, the track was not within Section 1 (22) of the Act.

El Dorado & Western Ry. Co. v. C. R. I. & P. Ry. Co., 5 F. (2d) 777.

Los Angeles and Salt Lake Railroad Company made application to the Commission to construct a track 1.87 miles to the plant of the Columbia Steel Company. The

Commission held the track was not within Section 1 (22) because it connected with a plant served by other carriers.

Operation by Los Angeles and S. L. R., 124 I. C. C. 207, 209, 210, 211.

Other typical cases:

Commodity Rates on Brick from Danville to Bronson, 63 I. C. C. 277,

Barrett Co. v. D. C., 88 I. C. C. 535, 539, 540,

Acquisition Iberia and Vermilion R. R., 111 I. C. C. 660.

Atlanta & St. A. B. Ry. Co., Applicant, 71 I. C. C. 784.

The case cited below is not a parallel case. It holds that a track which served a coal mine exclusively was an industrial spur. No competition with other carriers was involved. The track was typically a spur and is easily distinguishable from the case at bar.

U. S. v. Idaho, 298 U. S. 105.

XIV.

THE ORDER OF THE COMMISSION SHOULD BE SUSTAINED ON THE FURTHER GROUND THAT THE SEABOARD TARIFF IS WASTEFUL AND AN IMPROPER PRACTICE.

The Seaboard is absorbing out of its line haul revenue on traffic to and from Fort Benning $12.50 under its switching tariff. The Central either has to meet this competition or not participate in the traffic.

§1 (18) of the Act is designed specially to prevent undue competition. In the following case, which turned

on the grant of a certificate under §1 (18) of the Act, the Court said (p. 277):

> "It recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."
>
> Texas & Pac. Ry. v. Gulf, etc. Ry., 270 U. S. 266, 277.

Under §1 (6) of the Act "every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful".

Under §15a (2), the Commission is charged with the duty of establishing rates which will "under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."

The spirit and purpose of the Interstate Commerce Act is carried forward into the "Emergency Transportation Act 1933," (48 Stat. 212), and is expressed as follows:

> "§4. The purposes of this title are (1) to encourage and promote or require action on the part of the carriers and of subsidiaries subject to the

Interstate Commerce Act, as amended, which will * * by control allowances, accessorial services, and the charges therefor, and other practices affecting service or operations, to the end that undue impairment of net earnings may be prevented, and by avoid other wastes and unreasonable expense."

The broad powers of the Commission with respect to rates and practices of the carriers and the procedure thereof and the prevention of undue rates, are set forth in

The New England Divisions Case, 261 U. S. 184.

Daylight Grain Case, 241 U. S. 253, 258.

In the case cited below, a railroad company owned a tariff governing charges from certain points to its lines. The rate issue was between two other railroads. The Commission canceled the tariff. The Court said that the order of the Commission was valid, because the effect of the order was to prevent the diversion of traffic from the railroad and the Commission had the power not only under §15 par. 2 of the Act but also had the power under §1 par. 4 of the Act to prevent undue competition. The order of the Commission was sustained on those grounds although the Commission did not put its order on those grounds.

Wallowa, et al. [illegible] 32 F. 2d 524

The District Court found R. 223 [illegible] another sufficient reason for sustaining the order and ordered in the report of the Commission [illegible] that the tariff unduly impairs the line haul revenue. The Appellants in their statement of points upon which they intend to rely except to this ruling of the District Court and say R.

300). Although the Commission made no finding of such impairment, and there was no evidence whatever before the Commission or the statutory Court which would support such a finding. There is ample evidence in the record to sustain the finding of the impairment of earnings. The District Court quotes in its decision (R. 331, 332) an extract from the second report of the Commission in Finance Docket No. 9700 (R. 230) as follows:

"Estimated earnings of the Fort Benning Railroad would be the equivalent of an average of $13.00 a car for the short movement between the Reservation and the Junction. This revenue would accrue from divisions of joint through rates and therefore would operate as a reduction, *pro tanto*, of the Central's or the Seaboard's revenue for the line haul * * *. Here the Applicant (Fort Benning Railroad) and its sponsors would be the sole beneficiaries of such practices, and at the expense of established carriers whose properties are in receivership". It further appears from Exhibit No. 47 to Docket 26483, (R. 1811), that the Seaboard paid Page and Harris for cars handled over the Fort Benning line from December 1, 1933, to the first half of June, 1934, which is about half a year, the sum of $17,517.15, which is at the rate of about $35,000 a year.

Judge Sibley, in his dissenting opinion, stated (R. 840): "The real objection is that the Seaboard is doing it free. The Commission, perhaps, thinks it unwise or unreasonable that it be done free but it has made no such fact finding. If it had, its order might stand, but cannot stand without it. The fact is of the class peculiarly for determination by the Commission."

We have shown above that the Commission specifically found the fact that the Seaboard was paying over

subject. The New England Divisions case and the Dayton-Goose Creek Railway Company case, cited by the District Court to sustain its findings on this point, were both decided under the Interstate Commerce Act and before The Emergency Railroad Transportation Act was passed.

XV.

THE FINDINGS OF THE COMMISSION IN FINANCE DOCKET NO. 9709 BECAME PART OF ITS FINDINGS IN DOCKET NO. 26483 BY REFERENCE THERETO AND BY VIRTUE OF THE STIPULATION THAT THE RECORD AND EVIDENCE IN THE FORMER DOCKET SHOULD BE CONSIDERED IN THE LATTER.

It appears from the proceedings in Docket 26483 that at the beginning of this proceeding Counsel for the Receiver of the Central offered to introduce in evidence in that proceeding the evidence before the Commission in Docket No. 9709. The introduction of the evidence in Docket No. 9709 was objected to by Counsel for the Seaboard. Director Bartel suggested that Counsel seek to agree later with respect to the matter and reserved his ruling upon the admission of the record (R. 92). Later in the proceeding there appears (R. 109) the following:

> "Mr. Cocke advised the Director that the Respondents withdrew their objections to the introduction of the record in Finance Docket No. 9709 provided that the entire record was placed in evidence, and with that understanding the record in that proceeding was received."

The Commission made two reports in Finance Docket No. 9709. The first report was made by Division No. 4 (R. 220), and the second report was made by the full Commission (R. 229).

The Commission in Docket No. 26483 specifically adopted by reference the findings in Finance Docket No. 9709 in the following language (R. 181, 182.):

> "The first report in the above case (referring to Finance Docket 9709) sets forth pertinent facts of record concerning the nature and extent of the Military Reservation and its rail traffic, the physical relationship of the area to the trunk line, the history of the connecting lines and its operations, the terms of the proposed lease and operating agreement, and the contentions for and against the application. The record in that case was by stipulation made a part of the instant proceeding."

Judge Sibley in his dissenting opinion (R. 339), states in connection with this matter:

> "The putting in evidence of the former proceeding in which Page and Harris were denied a certificate of public convenience did not make the findings in that case findings in this one. The Seaboard Air Line Railway Company and its Receivers were not parties to that proceeding and Page and Harris are not parties to this one."

The other two Judges in the District Courts referring to this contention of Judge Sibley, said (R. 330):

> "There were thus three reports of the Commission upon which the order complained of was founded, it affirmatively appearing that they all were considered by the Commission, and it would have been inexcusable tautology to have repeated findings already made and already a part of the record."

We have shown in a previous part of this brief the fact that although the Receivers of the Seaboard were not parties to Finance Docket No. 9709, that they were privies to it and that they were a part of the plan to

have the Fort Benning Line made a common carrier. Page and Harris were parties to Docket No. 26483. They were named as Respondents in the complaint of H. D. Pollard, Receiver, before the Commission (R. 27, 33).

XVI.

THE COUNTER CLAIM OF THE DEFENDANT, H. D. POLLARD, RECEIVER.

This counter claim is contained in the Answer of H. D. Pollard, Receiver, (R. 40, 84). The counter claim set forth that the Seaboard had no Certificate of Public Convenience from the Commission to operate the Fort Benning Line or to extend its line to Fort Benning, but that the Seaboard through the medium of its switching tariff and the contract of June 7, 1934, with Page and Harris had extended its line to Fort Benning and were operating the Fort Benning Line contrary to §1 (18) of the Act and that, notwithstanding the order of the Commission in Docket 26482, cancelling the switching tariff of the Seaboard, that the Seaboard was still continuing its practices just as though the tariff had not been cancelled by order of the Commission and that its practices continued after this suit was filed to annul the order of the Commission; and on these allegations the counter claim prayed that the Court would grant an injunction against the Seaboard to restrain it from extending its line to Fort Benning and from operating the Fort Benning line without a Certificate, contrary to the provisions of §1 (18) of the Act. The majority of the Court of three Judges granted the injunction on the counter claim and Judge Sibley dissented.

The facts alleged in the counter claim are practically undisputed and where there is any dispute about the facts they are amply sustained by the record.

It was stipulated that the Court should hear the counterclaim with the main case and that the evidence introduced before the Court would be applicable to the counter claim as well as to the main case. (R. 83). It was further stipulated (R. 83, 84) that the Seaboard had not received a Certificate to operate the Fort Benning Line and that after the order of the Interstate Commerce Commission in Docket 26483, the Seaboard maintained its arrangement with Page and Harris, whereby Page and Harris operated the line between Fort Benning Junction and Fort Benning as agents of the Seaboard and compensated Page and Harris for their services.

The Commission had done nothing to make the Seaboard comply with the order cancelling the tariff, and unless the Receiver of the Central could obtain an injunction under his counterclaim, the results of the proceeding before the Commission would have been nugatory.

XVII.

THE COUNTER CLAIM IS FILED IN CONFORMITY WITH EQUITY RULE 30. IT IS EQUITABLE IN CHARACTER. IT ARISES OUT OF THE TRANSACTION WHICH IS THE SUBJECT MATTER OF THE SUIT AND, THEREFORE, MUST BE PLEADED. IF IT AROSE OUT OF AN EXTRANEOUS MATTER, THE EQUITY RULE PERMITS THE COUNTER CLAIM.

Equity Rule 30 2nd paragraph provides:

> "The answer must state in short and simple form any counter claim arising out of the transaction which is the subject matter of the suit, and may, without cross bill, set out any set-off or counter claim against the plaintiff, which might be the subject of an independent suit in equity against him, and such set-off or counter claim, so set up, shall

> have the same effect as a cross suit, so as to enable the Court to pronounce a final judgement in the same suit both on the original and cross claims."

The subject matter of the Bill of Complaint is an order of the Commission, which cancels the tariff of the Seaboard under which tariff it was extending its operations over the Fort Benning line. The Seaboard was ignoring the order of the Commission. The counter claim seeks by the process of injunction to prevent the Seaboard from using the tariff as a means of operating over the Fort Benning line contrary to Section 1 (18) of the Act. The counter claim in this case is a typical case for a cross bill under the old practice.

> See especially Moore v. N. Y. Cotton Exchange, 270 U. S. 593, 609, 610.

It does not require any argument to demonstrate that the counter claim is equitable in character. It seeks injunction which remedy can be obtained only in a court of equity. The proceeding by injunction to prevent a violation of Section 1 (18) of the Act is authorized by Section 1 (20) of the Act.

The Equity Rule 30 provides in terms that if the counter claim arises out of the transaction which is the subject matter of the suit, it *must* be set up in the answer. If it does not arise out of the transaction, it *may* be set up in the answer.

The following case holds that the counter claim must be equitable, and that if it arises out of the transaction it *must be* brought forward in the answer, but if it does not arise out of the transaction it may be pleaded in the answer. And in this connection the Court said:

"The rule goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants. The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counter claims to those which are equitable is imperative."

American Mills v. American Surety Co., 260 U. S. 360.

See also:

Marconi Wireless Telegraph Co. v. Nat. E. S. Co., 206 Fed. 295, 298, 299.

Wire Wheel Corp. v. Budd Wheel Co., 288 Fed. 308.

Texas Co. v. Borne-Scrymser Co., 68 F. (2d) 104.

E. F. Hauserman Co. v. Wright Metal, Inc., 1 F. S. 43.

XVIII.

THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA CAN ENTERTAIN THE COUNTER CLAIM EVEN THOUGH UNDER THE VENUE STATUTES THE PLAINTIFFS MIGHT NOT BE SUABLE IN THAT DISTRICT.

In the case below the defendant filed a counter claim against the plaintiff under Equity Rule 30. The counter claim was not germane to the main case. The plaintiff made the point that not being a resident of the District it was not suable there on the counter-claim. The Court held:

"One who sues in a federal court of equity to enjoin infringement of his patent, thereby submits himself to the jurisdiction of that court with respect to all the issues in the case, including those pertain-

him to a counter claim praying that he be restrained from infringing the like patent of the defendant."

Lamson Register Amold Co. 241 U. S. 149

In the following case also the defendant filed a counter claim under Equity Rule 30 and the plaintiff made the point that not being a resident of the district it was not suable there. The Court said (p. 1911):

"We must assume that the counter claim in question is not wholly out of the subject matter of plaintiff's suit" and (p. 1911):

"The action upon a counter claim against one already in a court of his own choosing is very different in respect to venue from hailing him into that court."

General Electric Co. v. Marvel Rare Metals Co. 287 U. S. 430

In the same effect, see:

Frank L. Young Co. v. McNeal Edwards Co. 283 U. S. 808;

Art Metal Works v. Auto Match Corp. 86 F. (2d) 884;

Fahrenwald v. Corp. 38 F. (2d) 231;

Rhodes, etc. Mfg. Co. v. International Ticket Scale Corp. 37 F. (2d) 713;

Texas Co. v. Rome Scrymser Co. 68 F. (2d) 704;

Prosperity Co. v. Am. Laundry Mach. Co. 6 F. S. 513;

Rome-Scrymser Co. v. Gaffney Mfg. Co. 5 F. S. 405.

So that if under an illegal sale the purchaser can oust the owner claim now presented by the mortgagee cannot be allowed.

But the respondent claims he has a right to redeem by the mortgage and being in ignorance that a sale had taken place under the old equity procedure the Court would have given him relief on the ground that he was entitled to redeem by the mortgage.

[illegible]

[illegible]

[illegible]

Alexander, et al., Receivers, v. Hillman, 296 U. S. 222.

The counter claim in this case is clearly a subject matter of Federal jurisdiction, because the counter claim arises under §1 (20) of the Act to Regulate Commerce. There is also the necessary diversity of citizenship to support the jurisdiction of the Federal Court.

There is considerable conflict of authority as to whether counter claims which are *not* germane to the main suit can be entertained when there is a lack of Federal jurisdiction as to the counter claim.

Tennessee Products Co. v. Warner, 39 F. (2d) 200;

Kaumagraph Co. v. General Trade Mark Corp., 12 F. S. 230.

But as the counter claim is clearly germane to the main bill, the question of Federal jurisdiction in the counter claim could not arise because being germane to the main bill it is auxiliary and dependent thereto.

XIX.

THIS DEFENDANT ALTHOUGH NOT MADE A PARTY DEFENDANT BY THE BILL IS DEFENDANT AS A MATTER OF RIGHT UNDER THE STATUTE AND MAY INTERPOSE THE COUNTER CLAIM UNDER EQUITY RULE 30.

The Defendant, H. D. Pollard, Receiver, intervened and was made a Defendant (R. 48, 49). This Defendant became a Defendant not as a matter of grace but as a matter of right under the statute. The Receiver of the Central instituted the proceedings against the Receivers of the Seaboard before the Commission and invoked the order which the Receivers are seeking to annul in this case.

U. S. C. A. Title 28, §41 (28), is the statute which gives the District Court of the United States jurisdiction "of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission".

U. S. C. A. Title 28, §§46 and 48, both provide that the cases covered by §41 (28) shall be brought against the United States.

U. S. C.A. Title 28, §45a, provides that in a case to annul or set aside an order of the Interstate Commerce Commission "any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and *as of right*, and be represented by their Counsel * * * Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

Under § 45a, it is further provided:

> "The attorney general shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the attorney general therein."

It has been decided by this Court that such an intervening defendant can take a direct appeal to the Supreme Court even though the United States should refuse to participate in the appeal and the decision of the

Supreme Court would be binding on the United States. See especially pages 24 and 25 of the decision, in which the Court holds that such intervening defendants are "parties in the Court below, as of right, and not by grace or favor".

> I. C. C. v. Oregon-Washington R. & N. Co., 288 U. S. 14, 24, 25, 26.

When a party in interest in such a case appears in the case, he becomes ipso facto and as a matter of right a defendant. It is not even necessary that the Court should pass an order making such a party a defendant.

In Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U. S. 53, affirming Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc., 75 F. (2d) 472, this Court held:

> "In a patent infringement suit brought against the user of a machine, the manufacturer of the accused article was permitted to intervene. It, thereupon, answered, jointly with the defendant, denying infringement and challenging the plaintiff's patent, and, furthermore, set up, separately, a counter claim against the plaintiff for infringement of another patent, owned solely by the intervenor. There was no suggestion that the defendant had any interest in the counter claim, or that the issues tendered by or that might arise out of it could not be adjudged in a separate suit. Held: (1) that the facts alleged in the petition for intervention were insufficient to show that the intervener was the real party in interest or entitled to intervene as a matter of equitable right; (2) the counter claim was rightly dismissed; the intervener is limited to the field of litigation open to the original parties; (3) Equity Rule 30 does not authorize one given the privilege to intervene as party defendant to set up

and enforce against the plaintiff a counter claim not available to the original defendant and in which that defendant has no interest."

The case cited above does not militate against the case at bar for the following reasons:

1. The intervening Defendant in the case at bar not only had an equitable right to intervene, but had a statutory right to be a defendant and was the real party in interest.

2. The United States as Defendant could have brought forward the counter-claim which was filed by H. D. Pollard, Receiver, under the express provisions of section 1 (20) of the Interstate Commerce Act. This field of litigation was open to the original party defendant.

3. In the case cited above, the counter claim was not germane to the original bill. In the case at bar the counter claim is germane to the original bill.

XX.

THE THREE JUDGE COURT CAN DECIDE THE COUNTER CLAIM AS WELL AS THE ISSUE IN THE MAIN CASE.

A suit to enjoin an order of the Interstate Commerce Commission is an equitable suit. The process of injunction is a remedy which only a court of equity can afford. The United States District Court is given jurisdiction by U. S. C. A. Title 28, §41 (28) over cases brought to enjoin an order of the Interstate Commerce Commission.

U. S. C. A., Title 28, §§46 and 48, both provide that such suits shall be brought against the United States;

and under §45a any party in interest may become a party as a matter of right to the case brought against the United States.

If in such a case the plaintiff asks for an interlocutory injunction, the Judge of the District Court must call to his assistance two other Judges who then hear and decide the case both on interlocutory and final hearing, (U. S. C. A., Title 28, §47).

If the plaintiff does not ask for an interlocutory injunction, the District Judge does not call to his assistance the two other Judges and in that event he hears the case alone both on interlocutory and final decree. This point has been definitely decided under §266 of the Judicial Code (U. S. C. A., Title 28, §380) which is the statute which requires a three judge court in case an interlocutory injunction is sought to restrain the enforcement of a state statute by an officer or Board, and is substantially in the same words as is U. S. C. A., Title 28, §47.

Smith v. Wilson, 273 U. S. 388;

Stratton v. St. L., S. W. Ry. Co., 282 U. S. 10.

Irrespective of the number of Judges who sit in the case, it is still a case in the District Court, and it is a case of equitable cognizance, and the case is subject to the rules of procedure which relate to an equitable case. If an interlocutory injunction is invoked the three Judges sit in the case not only on the hearing of the interlocutory injunction, but they hear the case and determine it on final decree. If no interlocutory injunction is sought, the District Judge sits alone on both the interlocutory and final hearing.

In the case at bar an interlocutory injunction was sought therefore the three Judges heard the case on interlocutory and final hearing.

We maintain that the three Judges had power and jurisdiction to hear all the questions which might arise in the progress of the case. This was not a special tribunal or a statutory court confined to hear and decide the isolated question whether the order of the Commission should be annulled or set aside, and none other. The District Court is given power and authority under the statute to entertain a bill to enjoin an order of the Commission. The District Court is given jurisdiction under U. S. C. A., Title 28, §41, of twenty-eight (28) different subjects. There is nothing in the law to indicate that the jurisdiction of the District Court sitting as a court of equity in this particular matter was to be more restricted than its jurisdiction in other matters of equitable cognizance. The fact that the suit was to be instituted against the United States in the first instance does not in any respect affect the equitable powers of the District Court or its procedure. The circumstance that three Judges or one Judge sits in the case does not in any manner affect the jurisdiction or power of the District Court as a Court of equity. A justice of this Court or a Circuit Judge of this Circuit may sit at any time with the District Judge of this District, but that circumstance does not affect the jurisdiction of the District Court. The District Court in the case at bar, being composed of three Judges, there does not seem to us to be any difficulty in the three Judges deciding the whole case, both the main bill and the counter claim.

And especially is this true where the counter claim is germane to the original bill and would have been permissible under the old practice as a cross bill.

"The cross bill is auxiliary to the proceeding in the orginal suit, and a dependency upon it. It is said by Lord Hardwicke, that both the original and cross bill constitute but one suit, so intimately are they connected together."

Ayres v. Carver, 17 How. 591, 595.

"It is a rule of law in the Circuit Court of the United States that a cross bill in equity is but an auxiliary to the original suit and a dependency upon it; that is to say, it is an ancillary suit, and is always brought in the court in which is pending the original suit, of which it becomes a part * * * and it should pray that the cross cause and the original cause may be heard at the same time, and that one decree be made and entered in both causes, thus disposing of the rights of all the parties in the subject matter of the litigation."

U. S. v. Reese, 166 Fed. 347, 350.

The latter part of Equity Rule 30 is especially applicable here, which provides:

"And such set-off or counter claim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgement in the same suit both on the original and cross claims."

There may be room for argument that a defendant in a case of this character could not bring forward a counter claim which was not germane to the original bill; there does not seem to us to be any reason whatsoever why the three Judge Court in a case like this should not consider this counter claim, which is clearly germane to the original bill—a counter claim which either of the other Defendants, the United States or the Interstate Commerce Commission, could have brought

forward under the express provisions of Section 1 (20) of the Act.

It only remains to consider a case cited on this question by the Appellants.

Pittsburg & West Va. Ry. Co. v. U. S., 281 U. S. 479.

In that case, the Interstate Commerce Commission had granted the Wheeling & Lake Erie Railway Company authority to abandon its independent passenger station in Cleveland, and to use a union passenger station. The Pittsburgh & W. Va. Ry. was a stockholder of the Wheeling Company. It brought a bill against the United States and the Interstate Commerce Commission to enjoin the order of the Commission and joined in the suit as a defendant, the Wheeling Company claiming that the Wheeling Company in the contract it made with the Union Station Company had acted contrary to Ohio law and that its directors had acted without authority in the matter. The Supreme Court held first that the Pittsburgh & West Virginia Railway as a stockholder of the Wheeling Company, did not have such an interest as would authorize it to bring a bill to enjoin the order of the Commission, and, second, that there was a misjoinder of causes of action in that a suit to enjoin the order of the Commission could not be joined with a suit against the Wheeling Company to inquire into the lawfulness of its corporate action, because the two matters were wholly disconnected with each other.

The case at bar is wholly unlike the case cited. The Seaboard is seeking to set aside the order of the Commission cancelling its tariff. The Central, as a defendant, claims that through the medium of the tariff, the Seaboard is operating the Fort Benning Line without a

Certificate and asks that the Seaboard be enjoined. The two things are inextricably involved, and the case being in a Court of Equity, the Court can settle the whole controversy at one time.

XXI.

THE RECEIVERS OF THE SEABOARD CAN BE SUED IN THIS CASE, WITHOUT PREVIOUS LEAVE OF THE COURT OF THEIR APPOINTMENT, UNDER U. S. C. A., TITLE 28, §125, (JUDICIAL CODE §66).

U. S. C. A., Title 28, §125, (Judicial Code §66), provides:

> "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

The Receivers of the Seaboard in their motion to dismiss, the counter-claim, seek to avoid this statute by saying that the relief which the counter-claim seeks, will, if granted, "directly affect and interfere with the possession, operation and control of the properties of the Seaboard Air Line Railway Company".

The injunction which is sought by the counter-claim does not affect in the slightest degree the possession, operation and control of the properties of the Seaboard Air Line Railway Company. There is no property of any kind or character involved. The injunction seeks to prevent the Receivers of the Seaboard from operating over property which is no part of the receivership.

property. The case is within the very language of the Federal statute above quoted. The injunction seeks to prohibit the Receivers of the Seaboard from doing unlawful acts in carrying on the business connected with the receivership property, but does not interfere with the possession, use or control of any receivership property.

There are very few Federal cases which are in point on this question. There are a great many Federal cases and cases in other courts where receivers of a Federal court have been sued, without leave of court, on claims for damages.

The statute has been construed as permitting suits against the Receiver in *any* court and as not confining suits to the court in which the Receiver was appointed.

McNulta v. Lockridge, 141 U. S. 327;

Texas, etc. Ry. Co. v. Johnson, 151 U. S. 81;

Erb v. Morasch, 177 U. S. 584;

Central Trust Co. v. E. T. V. & G. R. R., 59 Fed. 523, 526.

A suit was brought in a state court to prevent a Federal receiver from abandoning a railroad as a public highway. The Court held that this case was triable in the state court, that the power of the state court is plenary short of actually and physically interfering with the possession of the property.

Royal Tr. Co. v. Washburn, R. & I. R. Co., 139 Fed. 865, reversing 113 Fed. 531.

Speaking of this Statute, the Supreme Court said:

"This Act abrogated the rule that a receiver could not be sued without leave of the court appointing

him, and gave the citizen the unconditional right to bring his action in the local courts, and to have justice in the amount of his demand determined by a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal Court."

Gableman v. Peoria, etc. Ry. Co., 179 U. S. 335, 338.

The Public Service Commission of New York was held entitled to bring an action in a state court, to recover a penalty or forfeiture under the Commission Act against a Receiver appointed by a Federal court without previous leave of the Court.

People v. Joline, 121 N. Y. Sup. 857.

A receiver of a Federal court may be sued without permission of the court for injuries caused by his maintaining and keeping a structure upon the lands of the Company, which is a nuisance to the party who sues.

Meyer v. Harris, 38 Atl. Rep. 690.

The Railroad Commission of Alabama brought a suit against a number of railroads, including the Federal Receiver of a Railroad, to compel them by mandamus to unite in providing and maintaining a Union Station in the City of Bessemer. The Federal Receiver objected that he was sued without leave of the Court which appointed him. The Supreme Court of Alabama held that it was not necessary under the Federal Statute that leave of the Court appointing the Recever should be granted to sue the Receiver. The Court said:

(p. 21): "This proceeding in no way involves the actual custody or control of the Receivers of the

Atlanta, Birmingham & Atlantic Railroad Company over the property of said Railroad Company. It undertakes to take no property from them whatsoever. It simply undertakes to *compel* the receivers, in their operation of the Railroad of which they are Receivers, to obey a valid law of this State."

The Court, after citing the Federal Statute, said:

(p. 21): "Under this Section it is generally held that previous leave of the Court in which the Receiver was appointed, to sue a receiver, is necessary only where the suit involves the actual custody or control by the Receiver of the property or a part of the property of which he is in possession or control as such Receiver."

The Court further said, after reviewing the authorities:

(p. 22): "This proceeding, in so far as the insolvent Railroad Company is concerned, as already stated, grows out of the *neglect* of its Receivers to *obey* one of the general laws of this State, which law has become operative in the City of Bessemer by virtue of the order of the Railroad Commission. For their neglect or refusal to obey or carry out the terms of this law, these Receivers, or the Railroad Company of which they are Receivers, are liable to a penalty fixed by the Act. For the collection of this penalty, undoubtedly an action, without first obtaining leave of the Court in which the Receivers were appointed, would lie. * * * And as this proceeding is to compel action on the part of the Receivers in a matter growing out of their management of the property as Receivers and required of them by the law of this State, we can see no reason why the above quoted Federal Statute does not apply to this case."

Railroad Commission v. Alabama Great Sou. R. R., et al., 64 So. 13.

An action of trespass is maintainable against a receiver of a Federal court without leave to sue, for closing up a road across a railroad track.

Atkinson, Receiver, v. Kreis, 140 Ga. 52.

The employees of a Federal court Receiver of a railroad brought an injunction suit in the state court of Iowa without leave of the Federal Court to enjoin the Receiver from denying them certain rights which they termed "rights of seniority". The District Court of the United States, held, after reviewing a number of cases, that the injunction could not be maintained because the Federal Statute authorizing suits against a receiver of the Federal Court without previous leave of the Court which appointed him "applies only to suits brought for the purpose of imposing some liability on the Receiver in respect to his acts. As to all matters relating to the possession, control and management of the property by the Receiver or the conduct of the business, the jurisdiction of the Court which appointed him, and which has possession of the property through him, is exclusive."

Dickinson v. Willis, 239 Fed. 171.

The decision may be right in this particular case because the injunction order related to the management and control of the employees of the Receiver, but it is respectfully submitted that the decision is contrary to the very terms of the statute when it says that the statute applies only to suits brought for the purpose of imposing some liability on the Receiver in respect to his acts, and does not relate to matters of control and management of the property by the receiver or the conduct of the business by the receiver. The Act specifically applies to "any act or transaction of his *in carrying on the business* connected with such property. Any act of the Re-

ceiver, therefore, which is done by him in carrying on the business of the receivership subjects him to a suit in any court without leave of the court appointing him, the only limitation being that the relief granted in the suit does not interfere with the actual physical possession and control of the physical property in the hands of the Receiver. The statute relates to any act of the Receiver in carrying on his business.

XXII.

LEAVE TO SUE THE RECEIVERS OF THE SEABOARD IS NOT NECESSARY WHERE THE SUIT IS A CROSS ACTION BROUGHT IN A SUIT INSTITUTED BY THE RECEIVERS THEMSELVES.

The Receivers of the Seaboard have invoked the jurisdiction of this Court and have thereby subjected themselves to any appropriate cross action and cannot prevent this Court from rendering complete justice as between the parties on the plea that leave has not been given to sue them by the court of their appointment.

> "Where a receiver is made a party to an action by leave of court it has been held that he is in the same position as any other litigant, and that the other parties to the action entitled to affirmative relief have a right to seek it by filing cross bills against him without first obtaining leave of court. So it has been held that in an action by the receiver, defendant may, without leave of court, file an appropriate counter-claim. On the other hand, it has been held that in an action by a receiver, defendant cannot without leave of court file an answer which is in effect a cross action against the receiver."

23 C. J. §546. p. 333. citing: Kortjohn v. Seimers. 29 Mo. A. 271.

The stockholders of the American Waterworks Company commenced an action against the Denver Union Water Company and others, to annul certain decrees under which the Denver Union Water Company held title to certain property which was also claimed by the American Waterworks Company. The Receiver of the American Waterworks Company was made a party to the case. Thereupon, the Denver Union Water Company brought a cross bill against the Receiver of the American Waterworks Company to quiet the title to the property. The Receiver claimed that he could not be sued by cross bill without leave of the court appointing him. The Court held:

> (p. 633): "The receiver in the case at bar is not entitled to the application of that rule as against the cross bills. He became a party by leave of the Court. The real subject-matter of controversy was the property affected by the foreclosure decrees. The effect of the Receiver's answer was to set up a claim to this property for and on behalf of the American Waterworks Company. Having done so, he was in the same position of any other litigant, and the parties to the action interested in the subject matter of the controversy had the same right to defend against his claim, and by appropriate proceedings seek relief against his claim, as against any other litigant. Where a defendant in a suit in chancery has equities arising out of the subject matter of litigation which entitle him to affirmative relief against other parties thereto, he may, as a matter of right, present such equities by way of cross bill. * * * It was not necessary for the parties filing the cross bills to procure an order from the Chancery Court of New Jersey for leave to file the same * * *. It was eminently proper, when the

Receiver was a party to the action, for the trial court to determine the ultimate rights of all the parties to the action, in the subject matter of controversy, and thus put an end to litigation as between them over questions properly involved."

Venner v. Denver Union Water Co., 90 Pac. 628, 633.

A Receiver of a railroad brought an action for damages against the Defendant Railway Company for forcibly removing from its right of way the plaintiff's tracks which had been constructed pursuant to a contract. The defendant filed a counter claim for damages resulting from plaintiff's failure to perform his part of the contract. The Receiver objected to the counter-claim on the ground that leave to sue had not been obtained from the court which appointed him. To this contention the Court replied:

(p. 725): "True, the general rule is that a receiver can neither sue nor be sued without leave of court first obtained. But where an action has been commenced by a receiver it would be a strange rule that would require the defendant in that action, who has been brought into Court on the Receiver's summons, to obtain leave of Court to present any matter in his behalf which is germane to the controversy. It is the policy of the Code of Civil Procedure that the entire controversy between the parties shall be settled, if possible, in a single action."

Curtis v. C. & E. Ry. Co., 119 N. E. 723, 725.

A Receiver in the United States Court brought suit in a state court to recover from the defendant the rent of a certain plantation. The defendant counter-claimed on the proposition that he owned one-half of the planta-

tion and that the Receiver for a number of years had collected rent from him on the theory that he did not own any part of the plantation. The Receiver objected to this counter-claim being entertained in the suit. The Court said:

> (p. 238): "The receiver voluntarily went into the state court and having voluntarily gone there, cannot question the right of that court to determine the controversy between himself and the defendant. A similar proposition was often affirmed in cases of bankruptcy, although by §711 Revised Statutes, the courts of the United States are given exclusive jurisdiction of 'all matters and proceedings in bankruptcy' * * *. Further, the right to sue a receiver appointed by a Federal Court without leave of the Court appointing him, is granted by the Act of August 13, 1888. A counter-claim or set-off comes within the spirit of that act."
>
> Grant v. Buckner, 172 U. S. 232.

XXIII.

THE ORDER UNDER WHICH THE RECEIVERS OF THE SEABOARD WERE APPOINTED IN SUBSTANCE AND EFFECT GIVES LEAVE TO SUE THE RECEIVERS.

The order appointing the Receivers of the Seaboard, which appears in the Record, p. 326, provides:

> "Said Receivers are authorized and empowered to institute and prosecute within this jurisdictional district or elsewhere in any court or before any officer, department, commission, or other tribunal, and in their own names as Receivers or in the name of the Railway Company as they may be advised by counsel, all such actions, proceedings, or suits as in

their judgment may be necessary for the recovery or proper protection of said property, or any part thereof, and the discharge of their trust, *and likewise, to appear in and defend any and all actions, proceedings or suits which may be instituted or prosecuted against them as Receivers in or before any such tribunal.*"

This order does not say in terms that leave to sue the Receivers is granted, but the authority to the Receiver to appear and defend in any court, must necessarily mean that leave is given to sue him in any court. The Receivers are in no position to object to being sued without leave of the Court appointing them, because they have the consent of the Court to appear and defend. Especially would this be true in a case where the main suit was instituted by the Receivers themselves.

> "Where the Federal Court appointing a receiver for a railroad expressly authorizing him to defend all actions theretofore brought seeking to establish any claim against the property in his hands, including the demands of plaintiff for damages for personal injuries, such order was ample authority for the maintenance of plaintiff's action against the Receiver, regardless of whether Act of Congress of March 3, 1887, etc., providing that every Receiver appointed by any United States Court may be sued respecting any act of his in carrying on the business connected with the property without previous leave of court, authorizes such a suit without leave."

The Federal Act quoted, applies only to acts or transactions of the Receiver and would not, therefore, apply to a personal injury case which arose before the receivership. The point of the decision is that the order of the

Court authorizing the Receiver to defend such actions was equivalent to leave to plaintiff to sue the Receiver on such an action.

International & G. N. Ry. Co. v. Wynne, 122 S. W. 50.

Respectfully submitted,

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APPENDIX

Equity Rule 30

"The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. **

"The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

Applicable Sections Of The Interstate Commerce Act.

(U. S. C. A. §§ 1-27)

Certificate of Public Convenience and Necessity.

Section 1, paragraphs 18, 20 and 22 cover this matter.

Section 1, par 18: "No carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall have first have been obtained from the Commission" a certificate of public convenience and necessity.

Section 1, paragraph 20: "Any construction, operation, or abandonment contrary to the provisions of this

paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest."

SECTION 1, paragraph 20 further provides: "And any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

SECTION 1, paragraph 22: "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, etc."

Filing of Tariff's and Prohibition of Transportation Without Lawful Tariff.

SECTION 6 (1): "That every common carrier subject to the provisoins of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carries by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall

contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. ***** The provisions of this Section shall apply to all traffic, transportation, and facilities defined in this Act."

SECTION 6 (4): "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

SECTION 6 (7): "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act."

Power of Commission to Enforce the Act.

SECTION 12 (1): "The Commission is hereby authorized and required to execute and enforce the provisions of this Act." The Commission is further authorized to request any District Attorney of the United States to institute and prosecute under the direction of the Attorney General of the United States, " all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violators thereof."

SECTION 20 (9): "That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them."

Power to Enforce the Order of the Commission.

SECTION 13 (2): "**** And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

SECTION 16 (12): "If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that Court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the Court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

Cease and Desist Orders to Rates and Practices which are Unjust, Unreasonable, or Unjustly Discriminatory, or Unduly Preferential or Prejudicial or Otherwise in Violation of the Act.

SECTION 15 (1): When the Commission shall be of the opinion "that any individual or joint rate, fare or charge **** or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission" is authorized to determine and prescribe the just rate and practice to be thereafter followed, and "to make an order that the carrier or carriers shall cease and desist from such violation, etc."

Investigation of New Rate or Practice:

SECTION 15 (7): "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice, affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice, etc."

Undue or Unreasonable Preference and Advantage Forbidden.

SECTION 3 (1): "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality,or any particular description of

traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Improper Practices Prohibited.

SECTION 1 (6) provides: "** and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

Rates to Yield Fair Return on Value.

SECTION 15a (2): "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rate so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

ELKINS ACT

REBATING FORBIDDEN

SECTION 1: " * * * And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such

property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."

EMERGENCY RAILROAD TRANSPORTATION ACT 1933.

(48 Stat. 211):

"§4. The purposes of this Title are (1) to encourage and promote or require action on the part of the carriers and of subsidiaries subject to the Interstate Commerce Act as amended, which will * * * (b) control allowances, accessorial services and the charges therefor, and other practices affecting service or operation, to the end that undue impairment of net earnings may be prevented, and (c) avoid other wastes and preventable expense."

JURISDICTION OF DISTRICT COURT.

U. S. C. A., Title 28, §41 (28):

"The District Courts shall have original jurisdiction as follows: * * * Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

U. S. C. A., Title 28, §46:

"Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States, etc."

INJUNCTIONS AS TO ORDERS OF INTERSTATE COMMERCE COMMISSION; APPEALS TO SUPREME COURT.

U. S. C. A., Title 28, §47:

"No Interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or set

ting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Comerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to

the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

UNITED STATES PARTY-DEFENDANT IN SUITS AGAINST COMMISSION-INTERVENTION OF PARTIES.

U. S. C. A., Title 28, §48:

"All cases and proceedings brought under subdivisions 27 and 28 of Section 41 of this title, and sections 20 and 43 of Title 49 shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved."

U. S. C. A., Title 28, §45a:

"The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceeding under sections 20, 43, and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: Pro-

vided, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: Provided further, That communities, associations, corporations, firms and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein."

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

SUITS AGAINST RECEIVERS WITHOUT LEAVE OF COURT.

U. S. C. A., Title 28 §125:

"Every receiver or manager of any property appointed by any court of the United States may be sued

in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 295

LEGH R. POWELL, JR. AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF THE SEABOARD AIR LINE RAILROAD COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The majority and dissenting opinions of the specially constituted District Court (R. 327–342) are reported in 12 F. Supp. 938.

The report and order of the Interstate Commerce Commission (R. 9–20) are reported in 206 I. C. C. 362.

JURISDICTION

The final decree of the District Court was entered on June 4, 1935 (R. 342). Petition for appeal was filed on July 19, 1935 (R. 345) and was allowed on July 23, 1935 (R. 349-350). The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. C. Tit. 28, Sec. 47, and U. S. C. Supp. VII, Tit. 28, Sec. 47 (a)), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (U. S. C. Supp. VII, Tit. 28, Sec. 345).

QUESTIONS PRESENTED

1. Should the bill of complaint have been dismissed because the order of the Interstate Commerce Commission is not a reviewable order under the Urgent Deficiencies Act?

2. Was the tariff which the Commission struck from its files such a tariff as was lawfully entitled to be filed with the Interstate Commerce Commission under Section 6 of the Interstate Commerce Act?

3. Did the Commission exceed its authority by striking appellants' tariff from the files?

4. Does the Commission's order lack the requisite certainty and precision necessary to validity?

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the appendix (*infra*, pp. 63–67).

STATEMENT

This is an appeal from a decree of a specially constituted three judge District Court for the Southern District of Georgia dismissing appellants' bill of complaint in an action brought to enjoin and annul an order of the Interstate Commerce Commission, which struck from the Commission's files a tariff filed by appellants, and issuing an injunction against appellants on the prayer of the Receiver of the Central of Georgia Railway, an intervener in this suit.[1]

Fort Benning, Georgia, is a government military post where the infantry and tank schools of the United States Army are situated (R. 2, 282). It covers some 98,000 acres and has a population of between 7,500 and 8,000 people; also, about 1,000 head of livestock are situated at the post (R. 282). The Fort is about ten miles from Columbus, Georgia, and about six miles from Fort Benning Junction, Georgia (R. 52, 221). The lines of the Seaboard Air Line Railway (hereinafter called the Seaboard) and the Central of Georgia Railway (hereinafter called the Central) pass through Fort

[1] This case in reality is the culmination of two different proceedings before the Interstate Commerce Commission. Appellants were not parties to the first proceeding, which was entitled Finance Docket No. 9709 and which is reported as *Fort Benning R. Co. Acquisition*, 193 I. C. C. 223, 193 I. C. C. 517. That proceeding is of interest in this case only because most of the pertinent facts here involved were developed in that proceeding and the record therein was made a part of the evidence in the instant case (R. 181–182).

Benning Junction, which is their nearest approach to Fort Benning (R. 2, 52, 199–200). To connect the Fort with the lines of the Seaboard and the Central, the government in 1918 built a railroad approximately 6.8 miles long from Fort Benning to Fort Benning Junction (R. 52, 221). At the terminus of that line at the Fort the government constructed some three miles of switching, receiving, and delivery tracks, together with shops and facilities for the operation of the railroad (R. 52, 221).

There is no industry within the confines of Fort Benning, but a large amount of freight moves to and from the Fort (R. 14, 52, 282–283). This freight, which aggregates about 2,800 cars a year, consists of coal, gasoline, oil, ammunition, subsistence, clothing, household goods, and other freight, including a considerable amount of building material hauled for private contractors who are erecting buildings at the Fort under a program which will continue through 1940 (R. 209, 282–283).

For several years after the line was completed it was operated by government employees with government-owned motive power under the direction of the War Department. This arrangement proving unsatisfactory, the government licensed the Central by revocable license dated June 15, 1924, to operate the line from Fort Benning Junction to Fort Benning. Under this license the Central handled all cars moving to or from Fort Benning, but

the government continued to do the intra-terminal switching at the Fort. The Central was compensated by being allowed to establish certain arbitraries over and above its through rates for performing the services rendered (R. 52–53, 221–222).

This arrangement continued until September 2, 1932, when the Secretary of War issued an order, effective thirty days thereafter, revoking the license held by the Central. However, prior to the revocation of the Central's license, Henry A. Page, Jr. and C. F. Harris submitted to the War Department a proposal for the operation of the government line between Fort Benning and Fort Benning Junction. This proposal was accepted and since October 18, 1932, the line, together with the intra-terminal tracks at the Fort, has been operated by Page and Harris as private contractors under an agreement dated October 16, 1932 (R. 222–223). Under this agreement Page and Harris were given the right to use the equipment and facilities owned by the government, and they leased the tracks from the government at an annual rental of $100.00. The government agreed to pay Page and Harris $1,000.00 per month for doing the intra-terminal switching and $5.00 for each loaded car moved to or from Fort Benning Junction (R. 223, 186–195).

The operating agreement between the government and Page and Harris was originally intended to be a temporary arrangement and it was contemplated that Page and Harris would seek the

permission of the Interstate Commerce Commission to operate as a common carrier (R. 223). Subsequently Page and Harris did apply to the Commission for a certificate of public convenience and necessity authorizing them to operate as common carriers (R. 182–185, 220–221). This application was filed on November 5, 1932 (R. 220) and gave rise to an earlier proceeding (referred to in the footnote, *supra,* p. 3) before the Interstate Commerce Commission. That proceeding is known as Finance Docket No. 9709 and the record therein is made a part of the record in the present case (R. 181–182).

The Commission conducted hearings on the application of Page and Harris, and in June 1933 Division 4 of the Commission issued a report approving the application (R. 220–228). The Central, which had appeared as an interested party before the Commission and resisted the granting of the application, petitioned for a reargument and reconsideration before the entire Commission (R. 229). This petition was granted and on October 4, 1933, a report was issued reversing the decision of Division 4 and dismissing the application of Page and Harris (R. 229–233).

The Commission's report indicates that the reason for this action was the Commission thought that if the line from Fort Benning Junction to Fort Benning became a common carrier, the revenues of the Central and the Seaboard would be

endangered and impaired by the establishment of joint rates to Fort Benning. The Commission also indicated that it was of the opinion that the benefits accruing to Page and Harris by such an arrangement would not be commensurate with the service rendered by them or the cost of rendering that service. (R. 229–232.) After the Commission's denial of their application, Page and Harris continued to operate the line between Fort Benning and Fort Benning Junction as private contractors under the original lease and contract (Exhibits 38, 39; R. 165). During the period from October 16, 1932, to November 1933 railroad rates were not quoted to Fort Benning but only to Fort Benning Junction.

In November 1933 the Seaboard filed a tariff which gave rise to the subsequent proceeding before the Commission and the instant case before this Court. That tariff is identified as "I. C. C. A–6826, Sixth Revised, page 139," and provides that the switching limits of the Seaboard Railway at Fort Benning Junction shall include the receiving and delivery tracks at Fort Benning (R. 20–A). The effect of the tariff is that Fort Benning Junction and Fort Benning, a point some six miles from the tracks of the Seaboard at Fort Benning Junction, are to be treated as one point for rate-making purposes.

The means by which the Seaboard proposed to reach Fort Benning, and which it has subsequently used for that purpose, was to transfer shipments

at Fort Benning Junction to Page and Harris for transportation by the latter as the Seaboard's agent to Fort Benning, and to pay Page and Harris for such transportation at rates provided by a contract of June 7, 1934 (R. 21–25), between the Seaboard and Page and Harris which sought to establish such an agency. In substance this contract between the Seaboard and Page and Harris provides that Page and Harris are to receive $12.50 per car on all cars bringing the Seaboard revenue of $25 or more, and one-half of the total revenue to the Seaboard on all cars bringing the Seaboard a revenue of less than $25 (R. 21–25). In this connection it should be noted that private contractors at Fort Benning are also required to pay Page and Harris $5 per car for intra-terminal switching of all cars consigned to such private contractors arriving over the Seaboard (R. 118).

The Central has not established any similar tariff or made any contract with Page and Harris. However, so far as relates to consignments moving on government bills of lading, the Central has an informal arrangement with the government whereby it turns over such consignments to Page and Harris at Fort Benning Junction and pays to Page and Harris for the transportation of such consignments from Fort Benning Junction to Fort Benning $12.50 per car on cars bringing the Central a revenue of $25 or more and one-half of the total revenue to Central on cars bringing it less than $25

(R. 12, 95, 118). This arrangement was for the purpose of making it possible for the Central to retain a portion of the government business at Fort Benning. So far as relates to shipments moving to Fort Benning on private bills of lading, the Central delivers these to the consignee at Fort Benning Junction, leaving the consignee either to compensate Page and Harris for the further transportation from Fort Benning Junction to Fort Benning or to provide other means of transportation as the consignee sees fit.

The proceeding before the Commission which is directly involved in this case was initiated by a complaint filed on behalf of the Central on May 1, 1934, against appellants and Page and Harris. The complaint alleged that the tariff filed by the Seaboard and the services rendered thereunder were unlawful, and requested the Commission to cancel the tariff (R. 26–36).

After full hearing and argument the Commission, on February 5, 1935, issued the report and order herein sought to be enjoined. On the basis of the evidence before it, the Commission found that the Seaboard, by filing the tariff in question, had filed a tariff to a point not on its lines.[2] The

[2] More explicitly stated, the Commission found that the tariff was not an offer of a mere "off track" terminal service such as pick-up and delivery service, but was, in fact, an offer of a further and additional line-haul service under circumstances set forth, *infra*, at pp. 27–30.

Commission concluded that such a tariff was not a proper tariff within the meaning of Section 6 of the Interstate Commerce Act and accordingly issued its order in the following language: "It is ordered, That Sixth Revised Page 139 of said schedules be, and it is hereby, stricken from the files of this Commission" (R. 9–20).

The Commission also found in its report that the tariff covered a service which was prohibited by Section 1 (18) of the Interstate Commerce Act because it amounted to an extension of the lines of the Seaboard without the necessary certificate of convenience and necessity. However, the Commission did not base its order on that finding, but concluded that the tariff should be stricken from the files because it was not such a tariff as may be filed under Section 6 of the Interstate Commerce Act.

On February 19, 1935, appellants petitioned the Commission for a reargument and reconsideration of the order. On March 4, 1935, the Commission, without further report, denied the petition for reargument and reconsideration (R. 39–40).

On March 21, 1935, appellants filed their bill of complaint in the United States District Court for the Southern District of Georgia, asserting that the tariff in question was lawful, that the Commission's order and the report incorporated therein were based on erroneous principles of law and exceeded the lawful power of the Commission, and praying, among other things, for a decree per-

petually enjoining the enforcement, operation, and execution of the order and that it be set aside and annulled (R. 1–8). A specially constituted three-judge court was convened under the provisions of the Urgent Deficiencies Act to hear the case (R. 40).

By authority of Sections 212 and 213 of the Judicial Code, 36 Stat. 1150, U. S. C. A., Tit. 28, Sec. 45 (a), the Interstate Commerce Commission and H. D. Pollard, as Receiver of the Central, intervened as defendants (R. 44, 49). Certain parties affected by the Commission's order also intervened in support of the bill of complaint; but an order of severance having been entered, they are not parties to this appeal (R. 350). As part of his answer, Pollard filed a counterclaim praying that appellants and their agents be enjoined from performing service from Fort Benning Junction to the Fort and from using the tariff in question without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity as required by Section 1 (18) of the Interstate Commerce Act (R. 49–72). Appellants filed a motion to strike the counterclaim on the grounds that it did not set up a proper counterclaim in relation to appellants' suit and that the specially constituted court was without jurisdiction over the issues presented by the counterclaim (R. 72–77).

The District Court heard the case on the record as made before the Interstate Commerce Commis-

sion. By final decree that court dismissed appellants' bill of complaint and, overruling appellants' motion to strike the counterclaim, issued the injunction as prayed by appellee Pollard (R. 342–344). From that decree this appeal was prosecuted.

ARGUMENT

The United States and the Interstate Commerce Commission, two of the appellees on this appeal, are parties in this suit for the sole purpose of defending the order of the Commission and that part of the decree of the court below which dismisses appellants' bill of complaint and sustains the Commission's order. Neither of these appellees has any interest in the counterclaim which was filed and prosecuted by H. D. Pollard, the Receiver of the Central of Georgia Railway, who is also an appellee in this case. Consequently, this brief is directed solely to the question of whether or not the bill of complaint should have been dismissed by the court below.

I

THE BILL OF COMPLAINT SHOULD HAVE BEEN DISMISSED BECAUSE THE ORDER OF THE INTERSTATE COMMERCE COMMISSION IS NOT A REVIEWABLE ORDER UNDER THE URGENT DEFICIENCIES ACT

On February 5, 1935, the Interstate Commerce Commission issued its report and order in this case (R. 9–20). Omitting the preliminary formal statement, the order reads (R. 20):

> It is ordered, That Sixth Revised Page 139 of said schedules, be, and it is hereby, stricken from the files of this Commission.

The order was not directed to any party. It required no one to do or refrain from doing any act; it could not be enforced against any one; and, *a fortiori*, it could not be obeyed or disobeyed by any one. The order did not speak to the future or contemplate any future effect because, on and after February 5, 1935, the order had no significance except as a record of a certain completed act performed by the Commission.

On March 21, 1935, appellants filed their bill of complaint requesting that a statutory three-judge court be convened in accordance with the provisions of the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), and that such court enter an order "forever enjoining the enforcement, operation, and execution" of the Commission's order and requiring the same to "be set aside and forever annulled" (R. 1, 8). Thereafter a three-judge court was convened to hear the case (R. 40). The first defense interposed by the United States was that the bill of complaint did not state any cause of action cognizable in that court (R. 41–42). The court overruled that defense and stated that this was an affirmative order having an affirmative effect and that it was subject to review under the decisions of this Court in *United States* v. *New River Co.*, 265

U. S. 533; *Alton R. Co. v. United States*, 287 U. S. 229; and *Intermountain Rate Cases*, 234 U. S. 476.

It is submitted that in so ruling the court misconstrued the applicable decisions of this Court and transgressed the statutory limits of its own jurisdiction.

The jurisdiction of a statutory three judge court to review orders of the Interstate Commerce Commission is derived from the express provisions of the statutes and therefore is limited by the scope of those provisions. Jurisdiction to review such orders was originally conferred upon the Commerce Court by the Commerce Court Act of June 18, 1910, c. 309, 36 Stat. 539, which provided:

> That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:
>
> *First*. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.
>
> *Second*. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

By the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, the Commerce Court

was abolished and its functions were transferred to the several district courts to be performed under the procedure provided in that Act.

For the first nineteen years of the Commission's existence, its orders could not be enjoined by a court. In 1906, when the quasi-legislative function of rate-making was delegated to the Commission, Congress provided for judicial review of such orders by injunctive process.[3] Obviously, the intent of Congress was to set up expeditious machinery to satisfy the constitutional requirements for judicial review of quasi-legislative orders issued by the Interstate Commerce Commission. Typical of such quasi-legislative orders are those issued under Sections 3, 13, and 15 of the Interstate Commerce Act. Such orders prescribe reasonable, non-discriminatory, and non-preferential rates, rules, or practices for the future. Cf. *United States* v. *Illinois Central R. R.*, 263 U. S. 515; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Merchants Warehouse Co.* v. *United States*, 283 U. S.

[3] In *United States* v. *Los Angeles R. R.*, 273 U. S. 299, this Court said (p. 309):

> The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, * * *. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, * * *; and, when that Court was abolished, to the district courts, by the Urgent Deficiencies Act.

301; *United States v. Pennsylvania R. R.*, 266 U. S. 191; *Assigned Car Cases*, 274 U. S. 564; *Houston & Texas Ry. v. United States*, 234 U. S. 342; *Los Angeles Switching Case*, 234 U. S. 294; *Louisville & N. R. Co. v. United States*, 282 U. S. 740.

Disobedience of such an order of the Commission is punishable by heavy penalties. It will be noted that Section 16 (8) of the Interstate Commerce Act provides that any carrier "who knowingly fails or neglects to obey any order made under the provisions of Sections 3, 13, or 15 of this part shall forfeit to the United States the sum of $5,000 for each offense."

The protection which was given to persons affected by such orders was an expedited proceeding in equity before a specially constituted court of three judges and a direct appeal to this Court so that the validity of the Commission's orders issued under Sections 3, 13, and 15 of the Act might finally be adjudicated without delay. The very nature of this procedure indicates that Congress not only intended to give the public the earliest possible benefit of such orders but to afford carriers ample opportunity of questioning the orders without subjecting themselves to severe penalties *for failure to obey the orders.*[1]

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[1] The Interstate Commerce Act contemplates that all reviewable orders shall be reviewed with the least possible delay and with maximum protection to the persons affected by such orders. The procedure for review of the Commission's order is prescribed in U. S. C., Tit. 28, Sections 47 and

Obviously this extraordinary remedy cannot be invoked unless there has been an order issued by the Commission. *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *United States* v. *Corrick*, 298 U. S. 435. But as this Court pointed out in *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309, although the statute gives the statutory court jurisdiction over "any order," nevertheless "there are many orders of the Commission which are not judicially reviewable." In *Procter & Gamble* v. *United States*, 225 U. S. 282, it was held that the words "any order" do not include an order of the Commission which dismissed a complaint. This holding was followed in *Hooker* v. *Knapp*, 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United*

47a, which provides as follows: Suits to enjoin such orders are to be heard before district courts of three judges, one of whom shall be a circuit judge, and an injunction may be granted on the concurrence of two judges. An application for an injunction may be heard after five days' notice has been given to the Attorney General of the United States and the Interstate Commerce Commission. The Act requires that the hearing on such application shall be given precedence and shall be in every way expedited and shall be assigned for hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States from any decree granting or denying an interlocutory injunction in such case if the appeal is taken within thirty days. Any final judgment or decree may be reviewed directly by the Supreme Court of the United States if the appeal is taken within sixty days. Such appeals to the Supreme Court shall have priority in hearing and determination over all other causes except criminal causes in that Court.

States, 243 U. S. 412; *Piedmont & Northern Ry. Co.* v. *United States,* 280 U. S. 469; *Standard Oil Co.* v. *United States,* 283 U. S. 235, and others. In *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82, it was held that "any order" does not include an order fixing the date of a hearing before the Commission. In *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438, it was held that the words do not include an order declaring the tentative valuation of the property of a railroad company. In *United States* v. *Los Angeles R. R.,* 273 U. S. 299, it was held that the words do not include an order fixing a final valuation of a railroad company's property. In *Great Northern Ry.* v. *United States,* 277 U. S. 172, it was held that certificates issued by the Commission to the Secretary of the Treasury under Section 209, Transportation Act, 1920, stating the amount of the guaranty during the six months following the termination of federal control, were not orders within the meaning of the Urgent Deficiencies Act.

The fundamental principles underlying the foregoing decisions were enunciated by this Court in *Procter & Gamble* v. *United States,* 225 U. S. 282. That case involved the question of whether or not the Commerce Court had jurisdiction over an order of the Commission dismissing an application for a reparation order based on alleged undue prejudice and a claim for damages resulting therefrom. In construing the statute, this Court expressly stated that the power thereby con-

ferred to set aside and annul orders of the Commission goes no further than the power to enforce its orders, saying (pp. 293–294):

> Thus, the first subdivision provides for the enforcement of orders, that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission, and the second (the one with which we are concerned) dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph. In other words, by the cooperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order. The other provisions of the act are equally convincing. Thus, § 3 (208) provides that the mere pendency of a suit to enjoin, set aside, annul or suspend an order of the Commission "shall not stay or suspend the operation of such order" but confers upon the court the power, under circumstances stated, to restrain or suspend in whole or in part the operation of an order. The same section, moreover, causes the meaning of the provision, if possible, to become clearer by making a finding that irreparable injury will result from the operation of an order

> ought to be enforced essential to the granting of an order or injunction restraining or suspending its enforcement

Upon the reasoning of the foregoing opinion rests the decision in *United States v. Illinois Central R. R. Co.*, 244 U. S. 82, 92, holding that an order issued by the Commission which set down for hearing complaints filed with it was not an order within the meaning of the statute and reversing the decree of the specially constituted District Court which had enjoined and annulled the order. This Court said (p. 89):

> It will thus be observed, as said by counsel for the Commission, "the power of a court to stay the enforcement of an illegal order is, in a sense, reciprocal to its power to enforce compliance with an order of the Commission, 'if lawful.' * * * And just as the district court would have been powerless, in the instant case, to compel the appellee to attend the hearing with respect to which the notice had been given, so also was it without lawful authority to annul that notice or to enjoin the Commission from proceeding in the premises."[1]

Applying the foregoing principles to the instant case, it is patent that the Commission's order was not a reviewable order. The Commission merely ordered (R. 20) "That Sixth Revised Page 139 of said schedules, be, and it is hereby, stricken from

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[1] But compare *The Chicago Junction Case*, 264 U. S. 258.

the files of this Commission." This order is not directed to the carrier and does not require the carrier to do or refrain from doing any act. There is no possible way in which a court could be called upon to enforce that order because there is no way in which the order can be obeyed or disobeyed. If, as this Court has said, the power of a statutory three judge court to enjoin and set aside orders of the Commission is "coextensive" with the power to enforce those orders, this order cannot be enjoined or set aside because it is not susceptible of enforcement.

The court below avoided this question by saying that the order was affirmative in effect and, by necessary implication, required appellants to cease using the tariff in question (R. 329). But this view ignores the fact that neither the order nor its implications can be enforced against appellants. Appellants continued after the date of the Commission's order to carry on the practices covered by the stricken tariff (R. 83-84). Obviously, the order is not one which they can be prosecuted for violating, and if they are subject to any prosecution, it is for violating the specific provisions of the statute. This Court held in *Lehigh Valley Railroad Co. v. United States*, 243 U. S. 412, that a dismissal order which left a railroad in such a position as to require it to change its methods of operation or be in violation of the statute was not an order having an affirmative effect which could be reviewed.

Furthermore, the present order cannot be reviewed because no relief can be given by the court. From the date of issuance the order was no more than a statement showing that the tariff *had been stricken from the files* of the Commission. The act of striking the tariff is now a completed act which is a matter of history. Perhaps a proper court could by mandamus compel the Commission to restore the tariff to the files if, after appropriate consideration, it should be found that the order of the Commission was void and that the Commission had an absolute duty to keep the tariff in the files.[6] But a court whose jurisdiction is limited to enjoining, setting aside, and annulling orders certainly cannot give any effective relief because there is nothing to enjoin, and such a court is powerless to issue any decree which will replace the tariff in the files of the Commission.

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[6] In *Garfield* v. *Goldsby*, 211 U. S. 249, this Court held that mandamus was the proper remedy to compel the Secretary of the Interior to restore a name to a list from which he had stricken it, because the act of striking was wholly without authority of law. See also *Denby* v. *Berry*, 279 Fed. 317.

However, the question of whether or not an order is reviewable does not depend on whether mandamus or any other remedy is available to the complaining party. *United States* v. *Interstate Commerce Commission*, 294 U. S. 50; *Interstate Commerce Commission* v. *United States*, 289 U. S. 385. In both of these cases this Court held that mandamus should not be granted and, at the same time, clearly indicated that no other remedy was available.

The court below impliedly admitted that it could not issue a decree in the form of an injunction but intimated that, in its opinion, the words "set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" in the statute were sufficient to give jurisdiction to review the present order (R. 328–329). This doctrine is broad enough to permit judicial review of *any order* of the Commission and is therefore contrary to the express pronouncements of this Court (*supra,* pp. 17–18). Furthermore, such a doctrine must be founded on the theory that the review by a statutory three-judge court is in the nature of an appeal from the Commission's order. But every decision of this Court interpreting the provisions of the statute relating to review of orders of the Commission clearly indicates that the proceeding is fundamentally an equity proceeding, the purpose of which is not to determine the abstract validity of orders but to prevent the future enforcement of invalid orders.[7]

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[7] In *United States* v. *Los Angeles R. R.*, 273 U. S. 299, this Court, in discussing the jurisdiction of a statutory three-judge court under the Urgent Deficiencies Act to review orders of the Interstate Commerce Commission, stated that the Commission's "conclusions, if erroneous in law, may be disregarded. But neither its utterances nor its processes of reasoning, as distinguished from its acts, are a subject for injunction." In *Edward Hines Trustees* v. *United States*, 263 U. S. 143, it was held that parties complaining of orders of the Commission cannot maintain a suit against such orders unless they can show "that the order

The government does not contend that the order involved in this case is a "negative order" in the sense that it merely amounts to a refusal by the Commission to take jurisdiction or to hear a complaint. Neither is it contended that the order is "no order" in the sense that the Commission did not make any utterance which in form purported to be an order. Our position is that the fundamental infirmity in appellants' suit is that the order attacked does not present a factual basis essential to enable a statutory three-judge court to grant relief—that is, appellants do not and cannot show that there is either threat or possibility of enforcement of the order or of punishment for disobedience of it. Neither do they show, nor can they show, that a decree issued by a statutory three-judge court will prevent any act or any threatened act which will cause appellants any legal injury. Hence, there is neither ground nor occasion for an injunction, because there is nothing which the court's decree can prevent or compel.

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alleged to be void subjects them to legal injury, actual or threatened." Likewise, it was apparently the view of this Court in *Alabama* v. *United States*, 279 U. S. 229, that the "pertinent principles of equity" are to be applied by the specially constituted district courts and followed in suits seeking relief from orders of the Commission, just as those principles are applied by other courts sitting in equity.

II

THE TARIFF WHICH THE COMMISSION STRUCK FROM ITS FILES WAS NOT SUCH A TARIFF AS MAY BE FILED WITH THE INTERSTATE COMMERCE COMMISSION

A. THE TARIFF DID NOT COMPLY IN FORM AND SUBSTANCE WITH THE REQUIREMENTS OF SECTION 6 OF THE INTERSTATE COMMERCE ACT

Section 6 (1) of the Interstate Commerce Act provides in part:

> Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which

> in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.

It is obvious that this section contemplates that only three types of tariffs shall be filed with the Commission—(1) tariffs between different points on the carrier's own lines; (2) joint tariffs as established by two or more carriers between points on the line of one and points on the lines of the other; and (3) separately established tariffs of two or more carriers where there is a through route but no joint tariff.[8] The section further provides that the carriers shall include in such tariffs all extra charges, services, and facilities connected with the transportation covered by such tariffs.

The tariff here in question provides (R. 20–A):

> SWITCHING AT FORT BENNING JUNCTION, GA.
>
> Reciprocal Switching
>
> Fort Benning Junction, Ga., switching limits will include the receiving and delivery tracks at the Fort Benning Military Post.

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[8] In *Denver & R. G. R. Co.* v. *Interstate Commerce Commission*, 195 Fed. 968, 973, the Commerce Court stated:

> The sixth section of the Act recognizes three kinds or classes of rates, namely, the rates between different points on each carrier's line, the joint rates of two or more carriers when they have established through routes and joint rates, and the "separately established rates" applied by a carrier on through traffic when there is a through route but no joint rate.

It is not contended by appellants that this tariff is or has any relation to either a joint tariff or a separately established tariff. The tariff cannot be a joint tariff because it does not comply with Section 6 (4) of the Act.[9] Neither can it be a separately established tariff over a through route because it does not comply with the provisions of Section 6 (1) of the Act as set out above in that this tariff establishes a single rate and does not show that any part thereof is allotted to or charged by a separate carrier. Consequently if the tariff is such a tariff as may be filed at all under Section 6 (1), it must either be a tariff covering transportation between points on the carrier's own line, or a tariff covering a facility, service, or privilege rendered in connection with transportation between points on the carrier's own line.

Superficially the tariff does not purport to set out the Seaboard's rates to and from Fort Benning. But by including Fort Benning within the switching limits of Fort Benning Junction, the rates between all other points and the Junction are made applicable to the Fort. Consequently, there

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[9] Section 6 (4) provides:

> *Joint tariffs.* The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

would seem to be no question but that the tariff is in effect a schedule of "all the rates, fares, and charges for transportation" between all points on the Seaboard and the receiving and delivery tracks at Fort Benning.

In determining whether or not appellants are entitled to have on file such a tariff, it is necessary to determine whether or not Fort Benning is a point on the lines of the Seaboard which will permit this tariff to be classified as a tariff between points on the carrier's own lines. The answer to this question depends upon what ultimate conclusion must be reached from the undisputed facts as to the geographical location of the Fort with relation to the Junction, the character of the Fort, e. g., whether or not it can be regarded as an industrial plant or operation, the character of the traffic to and from the Fort, as bearing upon the question of whether the line can be regarded as a spur or plant facility, the previous transportation service available between the Junction and the Fort and the competitive relation between the Seaboard and the Central in this territory.

Fort Benning Junction is a point on the lines of the Seaboard Railway and the Central Railway approximately four miles southeast of Columbus, Georgia (R. 2). Some six miles from that point is located Fort Benning (R. 2). The Commission in its report states (R. 14):

> Fort Benning is not an industry and may more properly be described as a small city

or town. It has a population of between 7,500 and 8,000, including officers and their families, enlisted men and their families and civilian employees and their families, and approximately 1,000 head of stock, horses and mules, are stationed at the fort. The Army's Infantry School and Tank School are both at Fort Benning, and recently it has been used in connection with activities of Civilian Conservation Corps employees. The inbound and outbound freight consists of the many articles necessary to the subsistence of the inhabitants and equipment used in military activities in addition to a large amount of building material used in connection with erecting permanent buildings. About one half of the inbound shipments, which total approximately 2,800 carloads per year, are moved on government bills of lading, the balance on commercial bills of lading. No industrial operations are conducted within the reservation.

The federal government owns a line of railroad 6.8 miles in length, extending from Fort Benning to Fort Benning Junction and there connecting with the Seaboard Railway and the Central Railway (R. 229). At the Fort the government has constructed a system of receiving, delivering, and switching tracks to be used in connection with transportation over its line (R. 221). For about eight years immediately preceding September 2, 1932, the government's railroad was operated by the

Central under a revocable license from the Secretary of War (R. 229). On September 2, 1932, the license of the Central was revoked, and since October 18, 1932, the line from Fort Benning to Fort Benning Junction has been operated by private contractors Page and Harris (R. 229). The Seaboard does not and never has operated train service between Fort Benning Junction and Fort Benning.

It is submitted that on the basis of the foregoing facts the Commission had no choice but to find as it did on the basis of the testimony presented at the hearing that Fort Benning was not a point on the line of the Seaboard and therefore the Seaboard had published a tariff to a point not on its line (R. 16). This finding of fact was adopted by the court below and made a part of its findings (R. 337). Since the finding is one of fact which the Commission had to make in order to determine whether or not the tariff was a tariff which might be filed under the provisions in the Interstate Commerce Act and appellants do not challenge the finding as unsupported by evidence, it is submitted that the finding should not be reversed by this Court.

It is true that appellants, in arguing that the tariff does not violate Section 6 of the Act, apparently contended that Fort Benning is on the line of the Seaboard (appellants' brief, pp. 24–38). It does not appear that any claim is made that the

Commission's finding on the point was not supported by substantial evidence. Rather, the gist of the contention seems to be that the Commission in making the finding stated that Fort Benning could not be reached by the Seaboard, which statement appellants contend is contrary to the true facts and therefore proves that the Commission's finding was erroneous (appellants' brief, pp. 25–29). We do not believe that this contention raises any question open for consideration in this Court, but aside from that we submit that there is no merit in appellants' argument for the reasons now to be considered.

Appellants directed the Commission's attention to a certain contract entered into between the Seaboard and Page and Harris, the contract operators of the Fort Benning Line (R. 21–28). Paragraph 8 of that contract provides (R. 24):

> If, as and when the Railway so desires, but subject to approval by the Secretary of War, the Railway shall have the right to operate switching service with its own engines and crews over the tracks leased to and maintained by Contractors between Fort Benning Junction, Georgia, and the designated receiving and delivering track at the Fort Benning Military Post, the Railway paying to the Contractors a fair and reasonable compensation for the use of the Contractors' facilities.

Subsequently, the Assistant Secretary of War approved the contract in the following terms (R. 25–26):

> Approved, subject to revocation at will by the Secretary of War, as regards the provisions of paragraph 8 of the foregoing contract, subject to the reservation specified in paragraph 14 thereof, and further subject to the condition that Page and Harris, as Government contract operators of the Government-owned Fort Benning Railway facilities, shall ever hold themselves out as ready and willing to contract, on similar terms, with the Central of Georgia Railway and/or any other common carrier railroad.

The Commission considered the contract and made the following observation (R. 17):

> The Seaboard contends that by this endorsement the War Department has given approval to that company to operate the Fort Benning line whenever it so desires. We do not so construe it. The endorsement was an approval of the terms of the contract, but granted no rights to the Seaboard to operate over the track in question. Manifestly the War Department could take no action on a subject matter which the Congress has placed under our exclusive jurisdiction.

So far as the Commission was concerned, the pertinent question was not what rights as between interested individuals the Seaboard acquired by virtue of the contract but whether or not a rail-

road by private ~~control~~ contract can place on its lines a point which was not previously on those lines. There can be but one answer to that question. The Interstate Commerce Act fixes the lines of railroads because the railroads are deprived of the power to change those lines without first obtaining authority from the Interstate Commerce Commission. Section 1 (18) prohibits the extension or abandonment of lines without the approval of the Commission. No contention is made that the Commission has authorized the Seaboard to change its lines so as to reach Fort Benning. Without that authorization no private agreement entered into by the railroad can change the line so as to reach a point not on the line. See *Transit Commission* v. *United States,* 289 U. S. 121; *Louisiana, A. & T. Ry. Co. Operation,* 170 I. C. C. 602. Any other result would nullify the whole purpose of the Interstate Commerce Act. A railroad one hundred miles long could branch out so as to include on its lines any point in this country by merely entering into private agreements granting it trackage rights to such point. Under appellants' theory such a point would necessarily become a point on the line of the carrier and any finding to the contrary would be wrong.

Even appellants, at the time when they filed the tariff, were apparently of the opinion that Fort Benning was not a point to which they were en-

titled to file a schedule of fares, rates, and charges. The tariff is not drafted in the form of the ordinary tariff stating fares, rates, and charges to points on the line. Instead, it purports to state "reciprocal switching" at Fort Benning Junction, and provides that the switching limits of Fort Benning Junction shall include the receiving and delivering tracks at Fort Benning (R. 20–A). The theory of such a tariff must be that it offers a service, facility, or privilege given in connection with transportation to and from Fort Benning Junction. Obviously this service, facility, or privilege is free transportation to and from Fort Benning, which is a point not on the line of the Seaboard Railway.

The question then is whether the Interstate Commerce Act permits a railroad to file a tariff offering transportation to a point not on its lines by couching the tariff in the form of offering a facility in connection with transportation to points on the line. We submit that the express purposes of the Act can not be evaded by any such subterfuge. The Commission, in finding that the tariff was unlawful because it amounted to a publication of rates to a station not on appellants' lines, expressly negatived any conclusion that the tariff could be interpreted as offering a service or facility at Fort Benning Junction. Since this finding involved a construction of the tariff which is a question primarily within the jurisdiction of the Commission, that construction should not be reversed unless it is clearly without foundation. See *Standard Oil Co.* v.

United States, 283 U. S. 235; *Texas & Pac. Ry. Co.* v. *American Tie & Timber Co.,* 234 U. S. 138; *Famechon Co.* v. *Northern Pac. R. Co.,* 23 F. (2d) 307.

But even if the tariff is read literally as offering a service or facility in connection with transportation to Fort Benning Junction, it is not a proper tariff under Section 6 (1) of the Act, because, as will be pointed out, the service, facility, or privilege offered has no connection with transportation to and from Fort Benning Junction.

The applicable part of Section 6 (1) provides:

> The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.

It would seem evident that the types of services, facilities, and privileges referred to are those directly connected with and pertaining to the transportation between the point of origin and the destination point of shipment. So far as transportation over the railroad is concerned, both of

those points must be on the line of the railroad. Consequently, the service rendered must be rendered on the line in order to be connected with and pertinent to the actual transportation.

Appellants have argued at some length that both the Commission and the courts have approved of carriers offering "off line" services (appellants' brief, pp. 30–35). Their argument consists of pointing to numerous Commission reports and decided cases which they interpret as covering the exact situation here involved. But, as will presently appear, none of the reports and cases cited are applicable here. The distinction is that each of the instances cited by appellants involved "off track" service offered by the carrier as distinguished from the "off line" service offered by appellants' tariff. Neither the courts nor the Commission has consistently observed such a distinction in the language used when speaking of particular situations, but the distinction is one which most accurately describes the results of the decided cases and, although frequently difficult of application, has a fundamental basis in both precedent and principle.

"Off track" services are a development from the physical limitations of common carriers by rail. Obviously, a railroad can only run its trains to points reached by tracks. As a general rule the tracks of a railroad serving any particular city only pass through a small area of the city, and consign-

ments must be loaded and unloaded at the points reached by the tracks. However, it may reasonably be said that since the city is served by the line, other parts of the city than those immediately adjacent to the tracks are, in reality, on the line of the railroad. Consequently, the railroad may perform services in those parts of the city which are not physically adjacent to its tracks but are nevertheless on its line. But appellants clearly confuse and misconceive the principle of those cases, for if, as appellants conclude, the cases are authority for the proposition that a carrier may extend its services as it chooses, then the whole purpost of Section 1 (18) is readily defeated.

Appellants cite a number of cases which they contend are authority for the proposition that a carrier is entitled to give "off line" service whenever it chooses and that the Commission has no control over the carrier's election to do so (appellants' brief, pp. 30–35).

A careful analysis of these cases reveals that neither the courts nor the Commission has ever intended to sanction the extension of carriers' transportation service to points *off* of its existing and fixed line in any decision that has been rendered since the enactment by Congress of the Transportation Act of 1920, c. 91, sec. 402, 41 Stat. 477, which denied interstate carriers the right to extend, abandon, or change their lines in any way without the express authorization of the Interstate Commerce Commission. In classifying the cases cited by ap-

pellants, it will be noted that *Vicksburg etc. Ry. Co.* v. *Anderson-Tully Co.*, 256 U. S. 408; *United States* v. *B. & O. R. Co.*, 231 U. S. 274; *Cattle Raisers Asso.* v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. 277; *Federal Sugar Refining Co.* v. *B. & O. R. Co.*, 17 I. C. C. 40; and *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, are all cases which were instituted prior to the Transportation Act of 1920 which added paragraphs 18–22 to Section 1 of the Interstate Commerce Act. Paragraphs 18 to 22 of Section 1 are the provisions of the Act which prohibit a railroad from extending, abandoning, or changing its lines in any way without authorization from the Commission. Prior to 1920, when those sections were added, carriers were free to extend their lines into any territory which they might choose without obtaining permission from the Interstate Commerce Commission and without violating any provisions of the federal law.[10] The citation of these earlier cases is, therefore, of no aid to appellants' case.

The remainder of appellants' cases may be classified in three categories. In the first category are the "pick up and delivery service" cases which involve the practice of giving store door pick up and delivery service by truck at terminal points on the lines of common carriers by rail. These cases are instances of "off track" services (see *Central*

[10] See *Detroit Terminal R. Co.* v. *Pennsylvania-Detroit R. Co.*, 4 F. (2d) 705, affirmed (C. C. A. 1926) 15 F. (2d) 507, cert. den. 273 U. S. 758.

Transfer Co. v. *Terminal Railroad,* 288 U. S. 469) which are given at the terminal points and are part of the transportation between those points, for, as pointed out by the District Court for the Southern District of New York in *Merchant Truckmen's Bureau of New York* v. *Reardon,* 10 F. Supp. 358, "By force of paragraph (3) of Section 1, 49 U. S. C. A., Section 1 (3), both line haul and store door delivery are parts of the same transportation." Furthermore, the courts have clearly indicated that such service can be rendered without a certificate of public convenience and necessity as long as the service is part of the terminal or line haul service, but that if such service goes beyond terminal or line haul service, it is not permissible unless authorized by the Interstate Commerce Commission. *New York Dock Ry.* v. *Pennsylvania R. Co.,* 1 F. Supp. 20; *New York Dock Ry.* v. *Pennsylvania R. Co.,* 62 F. (2d) 1010.

The second category is that which includes the constructive terminal cases. The principal cases in this class are those involving off-track terminals in the metropolitan area of New York City. The Commission has pointed out that the transportation service at New York City creates a unique situation without parallel any place else in this country. *Constructive and Off-Track Freight Stations,* 156 I. C. C. 205, 207; *Lighterage and Storage Regulations at New York,* 35 I. C. C. 47, 52, 53. This may explain to some extent the latitude which has been permitted in applying the constructive

terminal theory to New York City. However, the important point which should be noted is that this theory rests on the premise that such constructive terminals are merely other points *at the terminus* of a railroad where transportation services may be rendered in connection with the line haul transportation to that particular terminus. In determining whether or not a carrier may establish constructive terminals without authorization from the Interstate Commerce Commission, the courts have indicated that the determining factor is whether the carrier is extending his line into new territory or is merely giving the public additional service at a point on its line in connection with the transportation which it is already offering. See *New York Dock Ry.* v. *Penna. R. Co.*, 62 F. (2d) 1010. In this connection it should be noted that Fort Benning Junction is not a city but merely a switching point in open country on the lines of the Seaboard and the Central (R. 199).

The last category is that which includes such cases as those involving spur or industrial tracks to stockyards, mines, manufacturing plants, etc. Those cases which involve transportation to stock yards do not support appellants' position, because such transportation is not only authorized but is required by Section 15 (5) of the Act. The decisions involving terminal switching or car spotting on spur or industrial tracks clearly have no application to this case for the Commission found and the record shows that Fort Benning is not an

industry or plant within the terminal area of Fort Benning Junction, but a small town located over six miles therefrom (R. 209, 282–283). Moreover, even spur or industrial track deliveries within switching or terminal districts do not include "deliveries through a system of interior switching tracks constructed as plant facilities," nor every case of spur track delivery regardless "of the location and extent of the spur tracks and the character of the movement." *Los Angeles Switching Case,* 234 U. S. 294, p. 310; *New York Central & H. R. Co.* v. *General Electric Co.,* 114 N. E. 115, pp. 118, 119 (cert. den. 243 U. S. 636).[11]

[11] As contradistinguished from the cases cited by appellants (appellants' brief, pp. 30–35) there are numerous cases in which the Commission and the courts have held that a carrier could not extend its tracks so as to give service at points quite close to the main tracks over which the carrier was operating unless authorized to do so by the Commission. *Texas & Pac. Ry* v. *Gulf, Etc., Ry.,* 270 U. S. 266 (extension 7.5 miles); *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.,* 286 Fed. 540 (extension 3.75 miles); *Eldorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 5 F. (2d) 777 (extension 1,500 feet); *Missouri Pacific R. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 41 F. (2d) 188 (extension 3,700 feet). See also *Public-Convenience Application of A. & S. A. B. Ry.,* 71 I. C. C. 784 (abandonment of 1.89 miles of track); *Chicago, St. L. & N. O. R. Co. Abandonment,* 202 I. C. C. 297 (abandonment of 3.925 miles of track) and *Louisiana, A. & T. Ry. Co. Operation,* 162 I. C. C. 766, 170 I. C. C. 602 (acquirement of trackage rights by contract).

Comparing the foregoing cases with the cases cited by appellants, it is apparent that distance is not the determining factor in deciding whether or not a carrier must obtain authorization from the Commission before it can give transportation service to a point not heretofore reached by the

It is submitted that neither the courts nor the Commission has ever intended to sanction the giving of common carrier services at points not on the lines of the carrier. As was said, *supra,* at p. 33, the Interstate Commerce Act fixes the lines of railroads and does not contemplate that those lines shall reach into new territory or be in any way changed without express permission from the Interstate Commerce Commission. If a railroad is entitled to move on to its lines a point previously off its lines by merely extending its switching limits, then there is no limit to the distance which the lines may be extended in this manner.

This all comes back to the question of whether or not Fort Benning is on the line of the Seaboard. The Interstate Commerce Commission found that Fort Benning was not on the lines of the Seaboard. The District Court sustained that finding and it is submitted that this Court must likewise conclude that appellants' tariff is an attempt to extend the lines of the Seaboard to a point not on those lines.

B. THE TARIFF OFFERS A SERVICE WHICH CANNOT LEGALLY BE PERFORMED

But even if it be assumed, *arguendo,* that appellants' tariff is a tariff so composed as to be a type of tariff that could be filed under Section 6 (1) of

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tracks of the carrier. These cases also demonstrate that a carrier cannot extend its transportation service to any point which it chooses by merely commencing operation to that point. In this connection the language in *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. 540, 546–547, is particularly enlightening.

the Interstate Commerce Act, there is another very cogent reason why this tariff was not entitled to a place in the Commission's files. Summarily stated, the reason is that the tariff is an illegal tariff because it covers transportation prohibited by Section 1 (18) of the Act, and therefore the tariff is not entitled to a place in the files of the Commission.

Section 1 (18) provides:

> No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad. * * *

Section 1 (22) provides:

> The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or

> parts of a general steam railroad system of transportation.

The effect of these two sections is to make it illegal for carriers to engage in certain kinds of transportation without authorization from the Commission unless that transportation is within the express exceptions carved out of the general prohibition. The Commission found that appellants in furnishing the transportation covered by the filed tariff here involved were engaging without the requisite authorization in transportation prohibited by Section 1 (18) and not within the exceptions of Section 1 (22). In its report the Commission stated (R. 13):

> The fact that the Seaboard has by the tariff here considered extended its line over the government-owned railroad to the fort is not open to question. Does this constitute such an extension that a certificate is necessary, or does it fall within the exceptions in section 1 (22)?

The Commission then proceeded to discuss the pertinent evidence bearing on this question (R. 14–15) and concluded by stating (R. 14):

> We are of opinion and find that the operation of the line between Fort Benning Junction and Fort Benning falls under the provisions of section 1 (18) of the Act and that before the Seaboard could lawfully operate the line in question a certificate of convenience and necessity would first have to be obtained.

Likewise the court below made findings of fact that (R. 338):

> 6. The line from Fort Benning Junction to Fort Benning is not a spur, industrial, switching, or side track as defined in Section 1 (22) of the Interstate Commerce Act. The haul from the junction to the Fort is a line haul service extending beyond the point that the Seaboard or any other railroad is entitled to operate and to which point beyond the junction no tariff as a line haul applies.
>
> 7. The Seaboard has not received a certificate of public convenience and necessity to extend its line from the junction to the Fort.

The evidence which supports these findings has been previously set out (*supra,* pp. 28–30). Since appellants do not contend that the findings are not supported by sufficient evidence, it would be useless repetition again to repeat the evidentiary facts supporting the ultimate findings. Consequently the question to be considered is whether or not a tariff which offers a transportation service prohibited by the Act is an illegal tariff not entitled to a place in the Commission's files.

The provision in Section 6 (1) for filing tariffs with the Commission was inserted in the Interstate Commerce Act by the Act of June 29, 1906. The purpose of that provision was to provide for a permanent file of all tariffs so that any person desiring to do so might consult the file and find what trans-

portation, charges, services, facilities, and privileges were available and in effect on the lines of any particular carrier. Furthermore, Section 1 (4) of the Act makes it mandatory for carriers to give shippers all transportation services, facilities, and privileges covered by filed tariffs.

The effect of these two sections is to require that a tariff be filed to cover every act which a carrier is offering to perform for shippers and to compel the railroad to perform such acts for every shipper. Obviously, this does not contemplate that a carrier shall by filing the tariff hold itself out to the public as giving a service which is prohibited by the Interstate Commerce Act. Consequently any tariff of that nature, as well as the provisions of the statute requiring that the service offered by the tariff be performed, must give way to the express provision of the statute prohibiting performance of the service. Otherwise there would be created an anomalous situation in which the carrier would be compelled by law to do an act which is forbidden by law. Under such circumstances the Commission's files would obviously be misleading if they contained such a tariff. *Atchison, T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, 98.

That appellants' tariff presents this situation is apparent. Section 1 (18) of the Act forbids appellants to extend their lines as they have attempted to do by contract with Page and Harris. The tariff which they have filed covers this forbidden extension and offers transportation over the ex-

tension. Consequently the tariff and the statutory provision requiring that the service offered by the tariff be performed must give way to the express prohibition of the statute, making such service illegal.

The Commission, however, after finding that the tariff was illegal because it covered a service prohibited by Section 1 (18), did not make any order on the basis of that finding. The Commission was apparently impressed with the appellants' contention that an order made on that ground would be an attempt to enforce Section 1 (18) and that under the holding in *Texas & Pac. R.* v. *Gulf, Etc. Ry.,* 270 U. S. 266, the exclusive method of enforcing Section 1 (18) was contained in Section 1 (20), and the Commission was therefore without power to make an order enforcing Section 1 (18). However, the court below was not impressed by appellants' contention, and on the basis of *Southern Pacific Co.* v. *Interstate Commerce Commission,* 200 U. S. 536, and *Wallower* v. *United States,* 32 F. (2d) 524, held that it was not bound by the reasons assigned by the Commission for making the order and could sustain the order if the Commission's report contained findings of fact which would support the order on any theory (R. 333–335). Since the Commission had found that the tariff covered an offer of transportation which could not be legally performed by appellants, the court concluded that the tariff was an illegal tariff

and that it violated Section 1 (18) of the Interstate Commerce Act.

On the basis of that conclusion the court below had no hesitation in holding that the illegality of the tariff was a sufficient reason to justify the Commission's order striking the tariff from the files, saying (R. 333):

> It must be borne in mind that there was no urge that the Commission enjoin the violation of Section 1 (18) but merely that the tariff be cancelled. Uncancelled it apparently panoplies the Seaboard against attack in courts for violation of Section 1 (18). Surely the Commission must have authority after declining the issuance of a certificate of convenience and necessity to prevent the continuance of the use of its files and its apparent approval of a scheme to defeat its formal decision. No one contends that the Commission can enjoin the Seaboard from either directly or indirectly Section 1 (18), any more than it could punish it criminally. But it can hardly be contended that the Commission must unwillingly acquiesce in fortifying a scheme it disapproves.

As pointed out by the District Court, the pertinent question is whether or not the tariff is illegal because it covers transportation prohibited by Section 1 (18), and there is no need to consider whether or not Section 1 (20) provides an exclusive remedy by court injunction for violations of

Section 1 (18).[12] Considering the case from this angle, it is not material what remedy is provided for violations of Section 1 (18) or whether any remedy is provided for violations of that section. The only question is: What may the Commission do to prevent its files from including a tariff which is illegal because it offers a prohibited transportation service? That question is fully discussed, *infra*, at pp. 52–55, and for the reasons there set forth it is submitted that the Commission may order such a tariff stricken from its files.

Appellants have argued that the necessary effect of the Commission's order is to restrain appellants from violating Section 1 (18) and therefore the Commission has encroached on the exclusive jurisdiction of the courts (appellants' brief, pp. 45–55). Without considering whether or not the exclusive remedy for violations of Section 1 (18) is vested in the courts, it is submitted that the Commission's order does not and can not have the effect which appellants say it has. It will be noted that after the Commission ordered the tariff stricken from the files, appellants continued to give the service which is covered by that tariff (R. 83–84). It is not contended that in so doing appellants violated

[12] In *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U. S. 266, 272, this Court stated that the Commission may pass upon the question of whether or not a proposed extension is within the terms of Section 1 (18) whenever the determination of that question is incidental to the determination of the issues presented by a proper proceeding before the Commission.

the Commission's order or that it would be possible to enforce the Commission's order against the appellants in such a way as to compel them to cease giving the service in question.

The essence of appellants' complaint is that now that the tariff has been stricken from the Commission's files, they are left in violation of Section 6 (1) of the Interstate Commerce Act and are subject to prosecution and penalties for giving a service which is not covered by a filed tariff. Aside from the fact that appellants' complaint rests on their own election to violate Section 6 (1), we submit that it is no concern of the courts or the Commission that the Commission in removing an illegal tariff from its files has left a carrier in violation of some additional sections of the Interstate Commerce Act. See *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412.

Unquestionably the Commission must have power to reject tariffs which do not comply in form and substance with the requirements of the Act and the administrative rules and regulations of the Commission. But appellants argue that if the tariff covers a service which cannot legally be performed, the Commission has no authority to refuse to keep on file such tariff unless the Commission is also vested with jurisdiction to restrain the illegal acts contemplated by the tariff. The basis for this argument is that such refusal on the part of the Commission would be an attempt to do indirectly

that which it cannot do directly. We submit that any such contention is contrary to the spirit and purpose of the Interstate Commerce Act because the Act only contemplates that carriers shall file tariffs complying in form and substance with the Act and offering services which may legally be performed and which may be compelled by law after being offered.[13]

III

THE INTERSTATE COMMERCE COMMISSION DID NOT EXCEED ITS AUTHORITY BY STRIKING APPELLANTS' TARIFF FROM THE FILES

A. THE COMMISSION HAS POWER TO STRIKE FROM ITS FILES TARIFFS WHICH ARE LACKING IN REQUISITE FORM OR SUBSTANCE OR WHICH OFFER SERVICES THAT CANNOT LEGALLY BE PERFORMED

Appellants attack the Commission's order on the ground that the Commission had no power to strike the tariff from its files (appellants' brief, pp. 44–45). Their argument appears to be predicated, *first,* on the contention that the tariff was in all respects a legal tariff, such as Section 6 of the Act requires carriers to file, and, *second,* on the contention that regardless of the legality of the tariff the Commission has no power whatever to strike tariffs

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[13] The District Court also held that the Commission's order might be sustained because the arrangement between the Seaboard and Page and Harris would result in the unlawful impairment of the Seaboard's revenue. Appellants have argued this point in their brief (appellants' brief, pp. 55–63), but the government did not raise the issue in the court below and will not discuss it in this brief.

after they are once filed. The first proposition merely raises the question of whether or not the tariff is illegal. That question has been fully considered (*supra,* pp. 25–51), and it is submitted that, for the reasons there discussed, the tariff is clearly illegal. The only remaining question is whether or not the Commission has the power to strike from its files tariffs which violate the statutory provisions of the Interstate Commerce Act.

Section 6 (1) of the Act contains specific provisions as to who may file tariffs and what shall be covered by filed tariffs. Obviously, it is not contemplated that any person desiring to do so may file a tariff nor that any person may file a tariff covering matters not within the purview of the statute (see *supra,* pp. 25–27). The Commission certainly may reject any tariff which the Act does not require to be filed, and the party affected by that rejection has no relief. But, as a practical matter, it would be impossible for the Commission to accept or reject every tariff at the time it is offered. In the course of a year the Commission receives thousands of tariffs for filing, and it can not be expected to meet and scrutinize every tariff at the threshold and winnow out and reject those which it should not receive.

In view of these considerations, the Commission early adopted the practice of striking from its files tariffs which were not legally entitled to a place therein. The practice seems to have originated in

Atchison, T. & S. F. Ry. Co. v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92. In that proceeding the Commission was requested to and did strike from its files a tariff which had been filed with it.[14] The Commission stated (p. 98):

> The prayer of the complaint is unusual, but is not beyond our power to grant. If defendant is not a common carrier and its tariff is part of a scheme devised by shippers to secure under pretense of common carriage allowances otherwise illegal, the tariff should be canceled, and we may enter an order striking it from our files. Otherwise our files might prove misleading, which it is, of course, within our power to prevent.

And concluded by saying (p. 102):

> An order will be entered striking defendant's tariff from our files.

Subsequently the Commission was called upon to determine whether or not a tariff filed by 11 carriers subject to the Interstate Commerce Act was so phrased as to be a legal tariff. *Transportation of Waste Materials*, 34 I. C. C. 337. The Commission there said (p. 339):

> It might be added that tariffs providing for this disposal service might be so phrased as to eliminate many of the uncertainties and

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[14] Other instances of this practice may be found in *Wharfage, Handling, and Storage Charges at Municipal Terminals, Norfolk, Va.*, 59 I. C. C. 88; *Trackage Charge on Loaded Cars*, 60 I. C. C. 134; and *Mercer Valley R. R. Co.* v. *Pennsylvania Railroad Co.*, 69 I. C. C. 233.

> perplexities which attach to the service under the tariff proposed. Among these uncertainties is the question of whether or not a definite consignment and bill of lading should be made; in whom title of the slag vests; and when and where transfer of such title, if any, is effected. Should these matters be provided for in appropriate tariffs, they will have due consideration by the Commission. It is clear, however, that the tariffs as filed do not conform with section 6 of the act and must be ordered forthwith stricken from our files.

In the present case, the question before the Commission was whether or not appellants' tariff was illegal because the Act did not provide for its filing and because it covered a service which appellants could not legally perform. The Commission, having answered the question in the affirmative, followed its own precedent of striking illegal tariffs from its files.

The Interstate Commerce Act does not specifically state in so many words that the Commission shall have power to strike tariffs from its files. The Commission, however, is made the custodian of the tariff files. It is empowered to prescribe the form of tariffs which are to be filed, and it is required to keep those files open for public inspection. The files are for the benefit and protection of the public and the Commission is the instrumentality charged with the duty of protecting the public interest. To deny that the Commission has

inherent power to keep the files in an orderly and serviceable condition by striking out extraneous matter, including illegal tariffs, would be to nullify the very purpose of the Act in requiring tariffs to be filed.[15]

B. THE PURPOSE AND EFFECT OF THE COMMISSION'S ORDER WAS NOT TO RESTRAIN A SUPPOSED VIOLATION OF SECTION 1 (18) OF THE INTERSTATE COMMERCE ACT.

Appellants say that the order, tested by its purpose and effect, was an attempt by the Commission to restrain a supposed violation of Section 1 (18) of the Act and was therefore invalid because it amounted to an exercise of the power not delegated to the Commission but vested solely in the court (appellants' brief, pp. 41–44). This argument does not raise the question of whether the tariff is fundamentally illegal and not entitled to be filed because it covers a service which appellants are forbidden to render by force of the provisions of Section 1 (18). So, for the purposes of this argument, it must be taken as admitted that the tariff does cover a service which appellants are not entitled to give because they have not complied with

[15] In this connection it should be noted that Congress in granting certain specific powers to the Commission under Section 15 of the Act, with relation to orders requiring tariffs to be cancelled, did not limit the power of the Commission to make orders. Paragraph 14 of Section 15 specifically states:

> The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this chapter.

that section. The sole question is whether or not the Commission's order must be construed as an attempt to restrain appellants from giving the illegal service and thus to usurp a function which may only be exercised by the courts.

The government does not consider it essential to discuss whether or not, in a proper case, the Commission might be entitled to exercise a coordinate jurisdiction with the courts in preventing carriers from violating Section 1 (18) of the Act. It is sufficient to point out that in this case there is absolutely no factual basis for any surmise that the Commission was attempting to restrain a violation of Section 1 (18) or any other section of the Act.

The Commission's report clearly shows that the Commission, although finding that the tariff did cover a service prohibited by Section 1 (18) (R. 14), did not even base its finding that the tariff was illegal on that theory (R. 16). As said by Circuit Judge Sibley in his dissenting opinion in the court below (R. 340):

> The Commission distinctly disclaims as a ground for its order that the Seaboard is operating to Fort Benning without a certificate of public convenience, and concedes that a court injunction under Interstate Commerce Act, Section 1 (20) is the exclusive statutory remedy for that.

The Commission's purpose in making the order could hardly be more explicitly stated than by its language (R. 19):

> Upon consideration of the record, we find that the Seaboard tariff which extends the Fort Benning Junction switching district to include the receiving and delivery tracks at Fort Benning is unlawful, in violation of Section 6 of the Act, and should be stricken from the files of the Commission.

Appellants' argument is based largely on the theory that the part played by the Central in the proceedings before the Commission gives rise to the inevitable conclusion that the Commission was attempting to restrain a violation of Section 1 (18) (appellants' brief, pp. 41–43). But regardless of the Central's motives, the majority opinion below points out that (R. 333):

> It must be borne in mind that there was no urge that the Commission enjoin the violation of Section 1 (18) but merely that the tariff be cancelled. Uncancelled, it apparently panoplies the Seaboard against attack in the courts for violation of Section 1 (18).

Furthermore, any contentions or pleadings by the Central in its complaint to the Commission in regard to interpretation of the law would have no bearing on the validity of the Commission's order. The Central might urge an interpretation of the law which is erroneous, but the fact that such an

erroneous interpretation was urged would not prevent the Commission from taking action pursuant to a correct interpretation. In *Chicago, R. I. & P. Ry.* v. *United States,* 274 U. S. 29, this Court said (pp. 36–37):

> The contention is that the commission was without power to predicate its order on paragraph (13) of § 6 of the act, because there is no formal reference in the complaint to that paragraph nor an order for an investigation under it on the commission's own motion. But the allegations of the complaint in matters of fact were sufficient to authorize the commission to consider the case under that provision as well as others; and this is enough.

But aside from the Commission's purpose in making the order, the order does not have even the effect of restraining a violation of Section 1 (18) or restraining any other action by appellants. The order merely deletes from the Commission's files an illegal tariff. Appellants have continued to give the service which they were giving under the tariff (R. 83–84), and no one can contend that the order of the Commission herein challenged is being violated. That the order may leave appellants in violation of additional provisions of the Interstate Commerce Act is no concern of the courts in this proceeding. To adopt appellants' theory as to the effect of the order would be to hold that no matter how lacking a tariff may be in requisite form and

content, the Commission is powerless to do anything which would nullify that tariff unless the Commission has authority to restrain the operations covered by the tariff. Such a position would be untenable.

IV

THERE IS NO MERIT IN APPELLANTS' CONTENTION THAT THE COMMISSION'S ORDER LACKS THE REQUISITE CERTAINTY AND PRECISION NECESSARY TO VALIDITY

Appellants have made the contention that "the Order lacks the certainty and precision requisite to the validity of an Order of the Commission" (appellants' brief, pp. 38–41). Appellants say that "In declaring the tariff to be unlawful as in violation of Section 6 without designating the provisions of that section with which it is deemed to conflict or otherwise apprizing appellants of a specific violation of law with which they are charged, the order lacks the certainty and precision which are requisite to the validity of an order of the Commission" (appellants' brief, p. 19).

A careful scrutiny of the bill of complaint (R. 1–8) does not reveal that any claim was there made that the Commission's order was invalid for the reasons set forth in this portion of their argument. Neither do the assignments of error (R. 346–349) indicate that appellants are complaining of any ruling of the District Court on this specific point. Consequently, appellants are precluded from advancing this contention as a ground for this Court

to reverse the decree of the District Court and nullify the order of the Commission.[16]

But aside from the foregoing considerations, appellants' contention is not sound as a matter of law. Undoubtedly the Commission must make such findings of fact as are necessary to show with reasonable certainty the Commission's jurisdiction and its reasons for entering the order so that the court, in applying the law to those findings of fact, may determine whether or not the order is authorized. But the Commission is not required to spell out in minute detail every part of the statute under which it acts. In *Southern Pacific Co.* v. *Interstate Commerce Commission*, 200 U. S. 536, the Circuit Court had upheld a cease and desist order of the Commission on the ground that the order was valid under Section 5 of the Interstate Commerce Act, although the Commission had relied solely on Section 3 in making the order. The contention was

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[16] In *Kansas City Southern Ry. Co.* v. *United States*, 282 U. S. 760, a suit was instituted before a three-judge district court for the purpose of testing the validity of an order of the Interstate Commerce Commission. Although there were no allegations in the bill of complaint to that effect, it was argued to this Court on appeal that the order was an invalid attempt to regulate intrastate commerce. This Court disposed of the argument, saying (pp. 764–765):

> With respect to the contention that the Commission's order undertakes to regulate movements of office cars in intrastate commerce, it is enough to say that no such contention was made in the petition in this suit.

there made that the Circuit Court had no power to uphold the order on grounds different from those relied upon by the Commission, but this Court stated that even though the Commission had based its order on the wrong section of the Act, the courts could sustain the order if the facts found by the Commission disclosed that the order was justified under any section.

Obviously, the Commission is not required to designate some particular section of the Act which it considers to be controlling if it is not essential to the validity of the order that the Commission designate the right section.[17] As a matter of fact, any attempt by the Commission to point out the portions of the statute which it considers applicable is superfluous because, as said in *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665–666:

> This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency of the findings made in other proceedings before it.

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[17] In *Wallower* v. *United States*, 32 F. (2d) 524, a three-judge District Court, sitting in the Western District of Missouri followed the decision of this Court in *Southern Pacific Co.* v. *Interstate Commerce Commission*, *supra*, saying (p. 529):

> The court must go behind the reasons assigned by the Commission or its counsel, if need be, and determine for itself the validity of an order.

CONCLUSION

For the foregoing reasons it is respectfully submitted that that part of the decree of the District Court which dismisses the bill of complaint should be affirmed.

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DECEMBER 1936

APPENDIX

The Interstate Commerce Act (U. S. C., Tit. 49, Sections 1–27) provides in part:

> SECTION 1. (4) It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.
>
> * * * * *
>
> (18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or

operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

* * * * *

(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the pro-

visions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

* * * * * *

(22) The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

* * * * * *

SECTION 6. (1) Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points in its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in

force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

* * * * *

(4) The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

* * * * *

(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the

same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

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SUPREME COURT OF THE UNITED STATES.

No. 295.—October Term, 1936.

Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company, Appellants, *vs.* The United States of America et al. } Appeal from the District Court of the United States for the Southern District of Georgia.

[March 1, 1937.]

Mr. Justice Butler delivered the opinion of the Court.

In proceedings initiated on complaint of the receiver of the Central of Georgia Railway Company, the Interstate Commerce Commission ordered to be "stricken from the files" a tariff filed by the receivers of the Seaboard Air Line Railway Company. The tariff extended Fort Benning Junction switching limits to include receiving and delivery tracks at Fort Benning military post. It was stricken on the ground that it extended to a station and covered transportation not on the line of the Seaboard in violation of § 6 (1) of the Interstate Commerce Act.[1] 206 I. C. C. 362. To annul that order the Seaboard brought this suit. The United States answered that the order is not reviewable and prayed dismissal of the complaint. The commission appeared and by its answer supported the order. The Central intervened; its answer contained, in what purports to be a counterclaim under Equity Rule 30, allegations ap-

[1] § 6 (1) "Every common carrier . . . shall file with the commission . . . schedules showing all . . . charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad . . . when a through route and joint rate have been established. . . . The schedules . . . shall plainly state the places between which property . . . will be carried . . . and . . . state separately all terminal charges . . . and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such . . . charges, or the value of the service rendered . . ."

§ 6 (7) "No carrier . . . shall engage or participate in the transportation of . . . property . . . unless the . . . charges . . . have been filed . . . nor shall any carrier . . . collect . . . different compensation for such transportation . . . or for any service in connection therewith, between the points named in such tariffs than the . . . charges which are specified in the tariff filed and in effect at the time . . ."

propriate for a complaint in a suit under § 1 (20) of the Act to prevent a violation of § 1 (18).[*] The Seaboard moved to strike out the counterclaim on the grounds, among other others, that it is not related to the cause of action alleged in the complaint, is not pleadable under Rule 30, and is not within the jurisdiction of a court of three judges under 28 U. S. C., § 47.

The case was tried by a court of three, a circuit judge and two district judges. After hearing the evidence, the court in an opinion from which the circuit judge dissented held the order valid on the grounds that the tariff aided the Seaboard to violate § 1 (18) of the Act and that it unduly impaired the Seaboard's line haul revenue in violation of § 1 (1) of the Emergency Railroad Transportation Act, 1933, 48 Stat. 211.[**] 19 F. Supp. 939. It entered a final decree denying the motion of the United States to dismiss and the motion of the Seaboard to strike out the counterclaim, declared the order valid and, in accordance with the prayer of the counterclaim, enjoined the Seaboard from extending its line from the junction to the receiving and delivery tracks at Fort Benning and from operating the line between these points without obtaining from the commission a certificate of public convenience and necessity, and from using the tariff and carrying out a contract for the use of the tracks between the junction and the fort as devices to avoid the need of such a certificate.

The questions for decision are:

Is the Seaboard's suit to set aside the commission's order within the jurisdiction of the lower court? If so, may its decree upholding the order be sustained?

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[*] § 1 (18) "No carrier by railroad . . . shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad . . ."

§ 1 (20) ". . . . Any construction, [or] operation . . . contrary to the provisions of . . . paragraph (18) . . . may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest . . ."

§ 1 22) "The authority of the commission, conferred by paragraphs (18) to (21) . . . shall not extend to the construction . . . of spur, industrial, team, switching or side tracks, located or to be located wholly within one State . . ."

Is the Central's counterclaim against the Seaboard within the jurisdiction of the district court of three judges under 28 U. S. C., § 47?

Fort Benning is a United States military post in Georgia; the reservation includes 98,000 acres and has a population of more than 7,500. A railroad 6.8 miles long, built and owned by the United States, connects receiving and delivery tracks at the post, Fort Benning, with a station, Fort Benning Junction, at the intersection of the lines of the Seaboard and the Central. For more than eight years prior to October 16, 1932, the line between the junction and Fort Benning was operated by the Central under a license granted by the Secretary of War. The Central made Fort Benning a station on its system. For transportation between the junction and that station the Central collected arbitraries fixed by it in addition to the tariff charges applicable between the junction and points of origin or destination. Most of the freight handled was inbound. The Seaboard ceased to use its connection at the junction and interchanged traffic to and from Fort Benning with the Central at Columbus, about four miles from the junction.

In October, 1932, the Secretary of War revoked the Central's license and arranged to have the railroad operated by contractors, Page and Harris. He leased to them the line in question, and they agreed to transport all freight to and from the junction. They undertook to organize a corporation and to have it apply to the commission for a certificate of public convenience and necessity to acquire and operate the line as a common carrier and then, by agreement with other carriers, to put in effect through routes and joint rates to and from Fort Benning as low as those to and from the junction and, out of its share of the rates so established, to take its pay for transportation performed by it.

Page and Harris organized the Fort Benning Railroad Company and caused it to apply for a certificate. The Seaboard gave assurances that it would join the new company in establishing through rates and divisions. The Central intervened in opposition. The application was granted by a division of the commission. 193 I. C. C. 223. But, on rearguments before the entire commission, the certificate was rescinded and the application denied. 193 I. C. C. 517. The applicant never operated the line.

Shortly after the failure of the contractors' company to establish itself as a common carrier, the Seaboard filed the tariff in ques-

tion, to become effective December 1, 1933. Under date of Jun 7, 1934, it made a contract with Page and Harris, stipulated to have been in force since the effective date of the tariff, whereby the latter agreed to act as its agents for transportation of freight be tween the junction and the receiving and delivery tracks named in the tariff. It agreed to pay them $1.50 for each loaded or partly loaded car handled in either direction or one half of the gross revenue when the amount earned by the car was less than $3.

Paragraph (8) of the contract provides that when the Seaboard so desires, but subject to approval by the Secretary, it shall have the right, upon payment of reasonable compensation to Page and Harris, to perform switching service with its own engines and crews over the leased tracks. By paragraph (11) of the contract Page and Harris reserve the right, subject to the Secretary's approval, to render like service for the Central or any other common carrier. The Secretary approved paragraph (8) subject to the reservation in paragraph (11) and to the condition that Page and Harris should ever hold themselves out as willing and ready to contract on similar terms with the Central or any other common carrier railroad.

The Central's complaint initiating the proceedings which resulted in the challenged order assailed the tariff on the grounds that it and the contract with Page and Harris constitute a device to avoid the commission's refusal to grant the Fort Benning Railroad Company a certificate of convenience and necessity; that by it the Seaboard seeks to extend its line to Fort Benning without obtaining a certificate and that it does not comply with § 6 (1) because it is obscure and ambiguous and fails to state the charges to be absorbed by the Seaboard or the compensation to be paid to Page and Harris. The complaint prayed cancelation of the tariff and cease and desist orders against the Seaboard and Page and Harris. It is obvious from the allegations and prayer of the complaint, as well as from its contentions before the commission, that the Central sought to have the commission prohibit the use by the Seaboard or its agents of the line between the junction and the fort because its violation of § 1 (18).

The commission's report states: The Seaboard employs Page and Harris as its agents and pays them for performance of transportation over the leased line and that service is common carrier service within the jurisdiction of the commission. The Central has not filed

a similar tariff and does not perform or bear the cost of service corresponding to that covered by the Seaboard's tariff. Before the Seaboard could lawfully operate the line from the junction to the fort, it would have to obtain a certificate of convenience and necessity. But the commission did not decide whether, on that ground, it had jurisdiction to order the Seaboard or Page and Harris to cease and desist or to suspend or set aside the tariff. It said (296 I. C. C. at p. 367): "Our finding of unlawfulness of the tariff is not predicated on the fact that the Seaboard has violated section 1 (18), but rather on the fact that it has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier, and consequently it cannot pay out of its line haul rates for a service which it is not legally obligated to perform and which it cannot perform except through the employment of the contractors with the Government." It added that approval by the Secretary of War of the contract between the Seaboard and Page and Harris "granted no rights to the Seaboard to operate over the track in question. Manifestly the War Department would take no action on a subject matter which the Congress has placed under our exclusive jurisdiction." The commission did not find that the tariff imposed any unreasonable burden upon the revenues of the Seaboard or unreasonable rates upon the carriage covered by it would be performed for less than reasonable compensation or that its use would result in any disadvantage to shippers, carriers or the public.

The United States and the Interstate Commerce Commission contend that the commission's order is not reviewable under the statute.[1] They do not suggest that the order is a negative one or that the commission did not make an affirmative finding in form sufficient to be an order. But they say that it is not directed to any party; it requires no one to do or to refrain from doing anything; it could not be enforced, obeyed or disobeyed; it did not speak to the future or contemplate any future effect because, on and after the date it was made, it had no significance except as a record of a certain completed act performed by the Commission.

But the emphasis upon the mere form of the order may not be permitted to obscure its purpose and effect. For it was the commission means to put an end to the tariff in question and the service it

[1] See 28 U. S. C. §§ 41 (28), 43, 44, 45, 45a, 47, 47a, 345; 49 U. S. C. § 320.

the Seaboard according to its terms. The tariff was a rule bin
ing the Seaboard to furnish transportation to and from the fa
for charges under other tariffs applicable to and from the jun
tion. The order would eliminate that rule and substitute for
terms of the tariffs applicable prior to its effective date. In effe
the order grants the relief sought by the Central's complaint:
confines the Seaboard's service within the junction switching limit
denies leave to that carrier to furnish, and prevents it from furnis
ing, transportation to and from Fort Benning. Interpreted a
ording to its purpose, the order is in substance and effect an a
firmative one and therefore reviewable under the statute. *Chicag
Junction Case*, 264 U. S. 258, 263; *Intermountain Rate Cases*, 23
U. S. 476, 490; *United States v. New River Co.*, 265 U. S. 533, 53
541; *Ulen & Co. v. United States*, 287 U. S. 299, 237. It is cle
that the district court of three judges had jurisdiction to entert
the Seaboard's suit.

2. As to the validity of the order. The commission held t
tariff violated § 6 solely because it covered service and publishe
rates to and from a station, Fort Benning, found not to be on t
line of the Seaboard. It may be assumed that, unless the reco
conclusively shows that the leased tracks constitute a part of th
Seaboard's line within the meaning of § 6, the tariff was not u
thereof and the commission's order should be sustained. In sub
stance, the facts found are: The United States leased the line t
Page and Harris. With the approval of the Secretary, the lesse
were employed by the Seaboard as its agents to transport freigh
over the leased tracks, and the Seaboard was given the right t
perform the transportation with its own engines and crews. Pag
and Harris reserved the right to render for the Central and othe
carriers service like that furnished by them as agent of the Sea
board, and were required by the Secretary to contract with suc
carriers on terms similar to those made with the Seaboard. Th
commission rightly held that in respect of the traffic covered by th
tariff Page and Harris as the Seaboard's agents were common car
riers and they and the service performed by them were subject t
its jurisdiction.

Whether the leased tracks be, within the meaning of § 1 (18) a
extension or *addition*, or, within the meaning of § 1 (22) spur
industrial, team, switching or side tracks, it is clear that the trans

portation over them by or for the Seaboard is required to be covered by a tariff filed in accordance with the Act. § 6 (7). The action of the Secretary was not inconsistent with proper exertion of the commission's authority to grant or withhold a certificate of public convenience and necessity for the use of the leased tracks by or for the Seaboard as required by § 1 (18), or to bring suit under § 1 (20) to enforce that paragraph. It follows that, § 1 (18) aside, the leased tracks covered by the tariff constitute a part of, and extend to or include a station on, the line of the Seaboard within the meaning of § 6. Indeed, there is nothing in the commission's report or in the briefs of appellees that tends to give support to the view that, if § 1 (18) had not been enacted, the tariff would not be valid.

As to the bearing of § 1 (18) on the validity of the tariff. The United States and the commission argue that the Seaboard cannot, by the arrangement for the use of the leased tracks, place Fort Benning on its line because thereby the Seaboard extends its line and § 1 (18) prohibits an extension without the commission's approval; that the tariff offers a service that cannot legally be performed because the extension not having been approved, is forbidden by that paragraph. And they say that, since the carrier is required to furnish whatever service is covered by its tariffs, the inclusion of that within the Seaboard's extended switching limits would compel the carrier to perform an act prohibited by § 1 (18), and this the commission may not permit. The purpose of §§ 1 (18) to 1 (22) of the Act was to empower the commission to proceedings instituted by a carrier proposing to engage in transportation over or by means of an additional or extended line authoritatively to decide whether it would be in the public interest. Unless the project is one covered by § 1 (18), the Commission is not authorized by the Act to consider whether it is in the public interest and, for lack of jurisdiction to determine that question, it must deny the application. Upon presentation by the carrier of application for a certificate, the commission, for the purpose of determining whether it is authorized by the Act to consider the merits, may pass incidentally upon the question whether the project is one covered by § 1 (18). But the decision of that question is for the court in either a suit to set aside an order granting a certificate or in a suit under § 1 (20) to enjoin a violation of § 1 (18). The function of

the court is to construe that paragraph; that of the commission i to determine whether the project, if it is one covered by the paragraph, is in the public interest. The Central was not authorized by the Act to initiate a proceeding before the commission to determine whether the Seaboard's use of the leased tracks was or would be in the public interest. If application for a certificate had been made, the Central could have appeared in opposition. The Seaboard not having made application, the Central's sole remedy was a suit under § 1 (20). That paragraph provides the only method for enforcing § 1 (18). It declares that any construction or operation contrary to § 1 (18) may be enjoined at the suit of the United States, the commission, the regulating body of the State affected or any party in interest. *Texas & Pac. Ry.* v. *Gulf, Etc. Ry.*, 270 U. S. 266, 271-274. *Piedmont & Nor. Ry.* v. *United States*, 280 U. S. 469, 476 *et seq.* *Chesa. & Ohio Ry.* v. *United States*, 283 U. S. 35, 42. *Western Pacific* v. *South. Pac. Co.*, 284 U. S. 47. *St. Louis S. W. Ry.* v. *Mo. Pac. R. Co.*, 289 U. S. 76, 81, 82. *Transit Commission* v. *United States*, 289 U. S. 121. *United States* v. *Idaho*, 298 U. S. 105, 109.

The contention of the United States and the commission comes to this: Fort Benning is not a station on the Seaboard's line because by use of the tariff and the leased tracks the carrier violates § 1 (18). Since the tariff extends to a station not on the carrier's line, it violates § 6. Therefore the commission rightly ordered the tariff to be stricken from its files. Plainly that begs the question. It takes for granted a violation of § 1 (18), a fact not established and one which the commission had no jurisdiction to determine. The contention is fallacious and must be rejected.

Plainly, the Central mistook its remedy. By its complaint against the tariff it sought an order of the commission equivalent to a decree of court in a suit under § 1 (20) enjoining the Seaboard from extending its service because contrary to § 1 (18). The order, as construed and supported by appellees, is the practical equivalent of such a decree. The governing statutory provisions do not permit substitution of the commission's order for a decree of court. The remedy provided by § 1 (20) is clearly inconsistent with a proceeding before the commission to attain the same end. Suits under that paragraph may not be tried before three judges. Those under the Urgent Deficiencies Act (28 U. S. C., § 47) to set aside orders of the commission cannot be tried in any other court. In suits

under § 1 (20), appeals must be taken to the Circuit Court of Appeals. Appeals from district courts of three judges must be taken to this court. The statutes cannot be construed to give the commission, a carrier or other party seeking to enforce § 1 (18) a choice of remedies; i.e., between a proceeding before the commission to invalidate the applicable tariff and a suit under § 1 (20). The latter is exclusive.

The gravamen of the Central's complaint is not that the Seaboard is engaging in transportation like that furnished by the Central before the Secretary revoked its license. But it is that the Seaboard does it without additional charges. There is nothing in the findings of the commission to suggest that the tariff unduly burdens the Seaboard's revenue or that it is unreasonable or unjustly discriminatory. Its findings on the Fort Benning Railroad Company's application although put in evidence are not findings in the proceeding in which was made the order in question and have no bearing on the validity of the tariff under consideration. The lower court erred in sustaining the commission's order on the ground that the "tariff unduly impairs the line haul revenue." The commission did not so find. The order cannot be sustained.

2. The counterclaim was not properly before the court and could not be entertained as an incident to or part of the suit to set aside the commission's order respecting the tariff.

The Seaboard's bill merely assails the commission's order. The issue between the original parties is confined to its validity. The suit is a statutory one triable only in a specially constituted court. The counterclaim is based on a violation of § 1 (18); the facts alleged are not sufficient to constitute a cause of action within the jurisdiction of that court. *Pittsburg & West Va. Ry. v. United States*, 281 U. S. 479, 488. Moreover, the counterclaim does not arise out of the transaction that is the subject of the suit and is not germane or related to it. Equity Rule 30 cannot reasonably be construed to authorize intervening defendants, in a suit to set aside an order of the commission, to set up counterclaims not arising out of or related to the subject matter of the suit. That would permit complications likely to burden and impede and would be contrary to the purpose and intent of the rule. *Chandler Co. v. Brandejas, Inc.*, 296 U. S. 53, 59. The counterclaim, not being within the jurisdiction of the specially constituted court, should have been dismissed for want of

jurisdiction. *Pittsburg & West Va. Ry.* v. *United States, ubi supra.*

Complainants were entitled to the judgment and decree of the specially constituted court declaring that the commission's order striking the tariff from its files is illegal and void and setting aside and annulling the same.

Reversed.

Mr. Justice BRANDEIS and Mr. Justice STONE took no part in the consideration or decision of this case.

Mr. Justice CARDOZO is of the opinion that the decree should be modified by striking the counterclaim of the intervening defendant, and as so modified, affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.